No. 06-1431
Title: CBOCS West, Inc., Petitioner
v.
Hedrick G. Humphries
Docketed: April 27, 2007
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (05-4047)
Decision Date: January 10, 2007
Rehearing Denied: January 29, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 25 2007	Petition for a writ of certiorari filed. (Response due May 29, 2007)
May 3 2007	Waiver of right of respondent Hedrick G. Humphries to respond filed.
May 8 2007	DISTRIBUTED for Conference of May 24, 2007.
May 17 2007	Response Requested . (Due June 18, 2007)
May 24 2007	Order extending time to file response to petition to and including July 18, 2007.
Jul 18 2007	Brief of respondent Hedrick G. Humphries in opposition filed.
Jul 27 2007	Reply of petitioner CBOCS West, Inc. filed.
Aug 1 2007	DISTRIBUTED for Conference of September 24, 2007.
Sep 25 2007	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m , Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Oct 5 2007	The time within which to file petitioner's brief on the merits is extended to and including November 15, 2007.
Nov 15 2007	Brief of petitioner CBOCS West, Inc. filed.
Nov 15 2007	Joint appendix filed. (Statement of costs received.)
Nov 16 2007	The time within which to file respondent's brief on the merits is extended to and including December 27, 2007.
Nov 21 2007	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Nov 21 2007	Brief amicus curiae of Chamber of Commerce of the United States filed.
Dec 19 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Dec 21 2007	SET FOR ARGUMENT ON Wednesday, February 20, 2008.
Dec 27 2007	Brief of respondent Hedrick G. Humphries filed.
Jan 2 2008	Brief amici curiae of New York, et al. filed.
Jan 3 2008	Brief amicus curiae of Members of Congress filed.
Jan 3 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 3 2008	Brief amici curiae of Leadership Conference on Civil Rights, et al. filed.

Jan 3 2008	Brief amicus curiae of United States filed.
Jan 3 2008	Motion for leave to file amici brief filed by Historians, et al..
Jan 3 2008	Brief amicus curiae of National Employment Lawyers Association filed.
Jan 15 2008	Record received from U.S.C.A. for the 7th Circuit. (1 envelope)
Jan 16 2008	CIRCULATED.
Jan 22 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 23 2008	Reply of petitioner CBOCS West, Inc. filed. (Distributed).
Feb 8 2008	Record received from the U.S.D.C. for the Northern District of Illinois. (1 box)
Feb 14 2008	Letter, dated February 8, 2008, from counsel for the petitioner received. (Distributed).
Feb 15 2008	Motion for leave to file amici brief filed by Historians, et al. GRANTED.
Feb 20 2008	Argued. For petitioner: Michael W. Hawkins, Cincinnati, Ohio. For respondent: Cynthia H. Hyndman, Chicago, Ill.; and Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

061431 APR 25 2007

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL W. HAWKINS
MICHAEL J. NEWMAN
Counsel of Record for Petitioner
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Is a race retaliation claim cognizable under 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner CBOCS West, Inc. makes the following disclosure:

Petitioner is wholly owned by its parent CBRL Group, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTORY PRAYER 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

A. *Sullivan v. Little Hunting Park* - The Uncertain Beginning of Retaliation Under Section 1981 . . . 3

B. *Patterson v. McLean Credit Union* - The Vacillation and Uncertainty Continues 4

C. The Civil Rights Act of 1991 - Continued Vacillation and Uncertainty 6

REASONS FOR GRANTING THE WRIT 8

A. The Continued Vacillation and Uncertainty 8

B. The Text of Section 1981 Does Not Make Race Retaliation Actionable 9

C. The Seventh Circuit's Holding Effectively Eviscerates Several Portions of Title VII 16

CONCLUSION 17

APPENDIX

Appendix A: 1/29/07 Circuit Court Order 1a
Appendix B: 1/10/07 Circuit Court Opinion 2a
Appendix C: 10/6/05 District Court Memorandum Opinion 47a

TABLE OF AUTHORITIES

Page

CASES:

Andrews v. Lakeshore Rehab. Hosp.,
140 F.3d 1405 (11th Cir. 1998) 6, 7, 9

Arlington Central School Dist. Board of Educ. v. Murphy, 126 S.Ct. 2455 (2006) 11

Army & Air Force Exchange Serv. v. Sheehan,
456 U.S. 129 (1959) 14

Branch v. Smith,
538 U.S. 254 (2003) 17

Calhoon v. Harvey,
379 U.S. 134 (1964) 8

Choudhury v. Polytechnic Institute of New York,
735 F.2d 38 (2d Cir. 1984) 4

Connecticut Nat. Bank v. Germain,
503 U.S. 249 (1992) 10

Cox v. Consolidated Rail Corp.,
557 F. Supp. 1261 (D. D.C. 1983) 4

Dawson Chemical Co. v. Rohm & Haas Co.,
448 U.S. 176 (1980) 8

Day v. Wayne County Bd. of Auditors,
749 F.2d 1199 (6th Cir. 1984) 7

Domino's Pizza, Inc. v. McDonald,
126 S.Ct. 1246 (2006) 11, 13

EEOC v. Frank's Nursery & Crafts, Inc.,
177 F.3d 448 (6th Cir. 1998) 16, 17

Ekanem v. Health and Hospital Corp. of Marion County, No. 77-224-C, 1980 U.S. Dist. LEXIS 16002 (S.D. Ind. Nov. 28, 1980) 4

Elder v. Holloway,
510 U.S. 510 (1994) 15

Evans v. Kansas City, Missouri School Dist.,
65 F.3d 98 (8th Cir. 1995) 9

Exxon Mobil Corp. v. Allapattah Services, Inc.,
545 U.S. 546 (2005) 11

Florida v. Rodriguez,
469 U.S. 1 (1984) 15

Foley v. Univ. of Houston Sys.,
355 F.3d 333 (5th Cir. 2003) 6

General Building Contr. Assoc. v. Pennsylvania,
458 U.S. 375 (1982) 3, 12

Goff v. Continental Oil Co.,
678 F.2d 593 (5th Cir. 1982) 4

Gonzalez v. Home Ins. Co.,
909 F.2d 716 (1990) 5

Hart v. Transit Management of Racine, Inc.
426 F.3d 863 (7th Cir. 2005) 7

Hawkins v. 1115 Legal Serv. Care,
163 F.3d 684 (2d Cir. 1998) 6, 10

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 13

Hicks v. Brown Group, Inc.,
902 F.2d 630 (8th Cir. 1989) 5

Houston v. Jewell Co., Inc.,
No. 85 C 10108, 1986 U.S. Dist. LEXIS
25835 (N.D. Ill. May 6, 1986) 4

Humphries v. CBOCS West, Inc.,
474 F.3d 387 (7th Cir. 2007) . . . . . *passim*

Jackson v. Birmingham Board of Education,
544 U.S. 167 (2005) 12, 15

Johnson v. Univ. of Cincinnati,
215 F.3d 561 (6th Cir. 2000) 7

Jones v. Bock,
127 S.Ct. 910 (2007) 11

Kim v. Nash Finch Co.,
123 F.3d 1046 (8th Cir. 1997) 6

Little v. United Technologies, Carrier Transicold Div.,
103 F.3d 956 (11th Cir. 1997) 7

Malhotra v. Cotter & Co.,
885 F.2d 1305 (7th Cir. 1989) 2, 13

Manatt v. Bank of America,
339 F.3d 792 (9th Cir. 2003) 6

McCary v. Ohio Civil Service Employees Assoc.,
No. C2-99-995, 2000 U.S. Dist. LEXIS
21386 (S.D. Ohio Nov. 22, 2000) 7

McKnight v. GM Corp.,
908 F.2d 104 (7th Cir. 1990) 5

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) . . . . . *passim*

Persons v. United Parcel Services, Inc.,
502 F. Supp. 1176 (N.D. Ga. 1980) 4

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 12

Runyon v. McCarey,
427 U.S. 160 (1976) 12

Sherman v. Burke Contracting, Inc.,
891 F.2d 1527 (11th Cir. 1990) 5

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) . . . . . *passim*

Tramble v. Converters Ink Co.,
343 F. Supp. 1350 (N.D. Ill. 1972) 4

Wagner v. Merit Distribution,
445 F. Supp.2d 899 (W.D. Tenn. 2006) 7

Winston v. Lear-Siegler, Inc.,
558 F.2d 1266 (6th Cir. 1977) 4

Zedner v. United States,
126 S.Ct. 1976 (2006) 10

STATUTES AND REGULATIONS:

42 U.S.C. Section 1981(a) 2

42 U.S.C. Section 1981(b) 2, 6

MISCELLANEOUS:

Civil Rights Act of 1991 6

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991) . 10

Rehnquist, THE SUPREME COURT - HOW IT WAS,
HOW IT IS (1987) 14

INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 10, 2007.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Illinois, issued on October 6, 2005, is reported as 392 F. Supp.2d 1047 (N.D. Ill. 2006) and has been included in the appendix on pages 47a - 54a. The Opinion of the United States Court of Appeals for the Seventh Circuit, issued on January 10, 2007, is reported as 474 F.3d 387 (7th Cir. 2007) and has been included in the appendix on pages 2a - 46a. The Order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Request for Rehearing, issued on January 29, 2007, is reported as No. 05-4047, 2007 U.S. App. LEXIS 3124 and has been included in the appendix on page 1a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on January 10, 2007. A timely Request for Rehearing was denied on January 29, 2007. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, *Title 42*:

> *Section 1981(a)* - All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> *Section 1981(b)* - For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

The sole legal issue presented here - whether race retaliation is cognizable under Section 1981 - is an issue that has suffered from years of jurisprudential vacillation and uncertainty. Appellate and district courts around the country have struggled mightily with the question of whether retaliatory discharge is encompassed within those five seemingly unambiguous words in Section 1981: "to make and enforce contracts." This Court has not squarely addressed this reoccurring question, arguably contributing (albeit inadvertently) to the vacillation and uncertainty with its decisions in *Sullivan v. Little Hunting Park* and *Patterson v. McLean Credit Union*.

A. *Sullivan v. Little Hunting Park* - The Uncertain Beginning Of Retaliation Under Section 1981

The uncertainty surrounding this issue started with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). In that case, the plaintiff, a white homeowner, sued a non-profit corporation created to operate a community park. *Id.* at 234. The homeowner had a transferable membership interest in the corporation, entitling him to use the park. *Id.* The homeowner sought to transfer his membership interest to a black homeowner, which, pursuant to the corporation's bylaws, required approval from its board of directors. *Id.* at 234-35. The board of directors refused to approve the transfer. *Id.* at 235. When the white homeowner protested, he was expelled from the corporation by the board of directors. *Id.*

The white homeowner then sued under Sections 1981 and 1982 based on his "expulsion for the advocacy" of the black homeowner. *Id.* at 237. This Court held that the white homeowner had standing to bring a Section 1982 action. From the Court's perspective, the white homeowner was "punished for trying to vindicate the rights of minorities protected by s 1982." *Id.* The Court reasoned that "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* In so holding, the Court did not reference the term "retaliation" or "retaliatory termination," nor analyze the applicability of Section 1981 to the facts. Yet it seemed obvious from the Court's opinion that retaliation claims were cognizable under Section 1982, which, of course, is Section 1981's companion statute. *Humphries*, 474 F.3d at 394 ("it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another"); *General Building Contr. Assoc. v. Pennsylvania*, 458 U.S. 375, 384

(1982) (recognizing that Section 1982 is Section 1981's "companion statute").

In the wake of *Sullivan*, courts divided on the issue. At the district court level, some courts concluded that retaliation was cognizable under Section 1981. *See e.g. Cox v. Consolidated Rail Corp.*, 557 F. Supp. 1261, 1266 (D. D.C. 1983); *Houston v. Jewell Co., Inc.*, No. 85-C-10108, 1986 U.S. Dist. LEXIS 25835, at *3-6 (N.D. Ill. May 6, 1986). Other district courts reached the opposite conclusion. *See e.g. Tramble v. Converters Ink Co.*, 343 F. Supp. 1350, 1354 (N.D. Ill. 1972); *Persons v. United Parcel Services, Inc.*, 502 F. Supp. 1176, 1176 (N.D. Ga. 1980); *Ekanem v. Health and Hospital Corp. of Marion County*, No. 77-224-C, 1980 U.S. Dist. LEXIS 16002, at *66-67 (S.D. Ind. Nov. 28, 1980). At the circuit court level, however, there emerged a "general consensus . . . that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including 'post formation' adverse acts, such as retaliation." *Humphries*, 474 F.3d at 394. *See e.g. Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982); *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 44 (2d Cir. 1984). The "general consensus" that existed among the circuits was short-lived.

B. *Patterson v. McLean Credit Union* - The Vacillation and Uncertainty Continues

This Court's 1989 decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) dramatically changed the doctrinal landscape of Section 1981. In *Patterson*, the Court confronted the question of whether a racial harassment claim was cognizable under Section 1981. It answered this question in the negative. In doing so, the Court vaguely defined for

the first time the parameters of Section 1981 in the employment context, namely the meaning of the phrase "to make and enforce contracts." According to the Court, Section 1981 means exactly what it says: the right to make contracts and the right to enforce contracts. *Patterson*, 491 U.S. at 176. The first right, the Court explained, "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177. The second right, the right to enforce contracts, was also narrowly and literally construed. This right, according to the Court, only protects against "*private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* at 177-78 (emphasis in original).

Patterson's textually sensitive construction swept from Section 1981's coverage "so called 'post-formation' discriminatory conduct of an employer." *Humphries*, 474 F.3d at 394. Naturally many of the circuit courts reversed course on the position they had taken post-*Sullivan* and concluded that retaliation, which they viewed as "post-formation" conduct, was not cognizable under Section 1981. *See e.g. McKnight v. GM Corp.*, 908 F.2d 104, 112 (7th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 719-20 (2d Cir. 1990); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1534-35 (11th Cir. 1990). However, not all of the circuits were convinced that *Patterson* foreclosed Section 1981 based retaliation claims. The Eighth Circuit in *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 635 (8th Cir. 1989) held that a "claim for discriminatory discharge continues to be cognizable under Section 1981." Thus, despite the major

circuit shift, in the years following the Court's decision in *Patterson*, there was continued uncertainty.

C. The Civil Rights Act of 1991 - Continued Vacillation and Uncertainty

Two years after *Patterson*, Congress amended Section 1981 with the Civil Rights Act of 1991. The amended Section 1981 saw the addition of a new subsection, which reads:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1981(b). On its face, the new subsection does not mention retaliation or retaliatory termination. Nevertheless, the addition of subsection (b) prompted yet a second major shift in the circuits, with a number of courts modifying their post-*Patterson* position on the question. *Humphries*, 474 F.3d at 397 ("[t]he Civil Rights Act of 1991 led several circuits to reverse course (again) . . . "). To date, the Second, Fifth, Eighth, Ninth, and Eleventh circuits have directly addressed the issue. *See Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997); *Manatt v. Bank of America*, 339 F.3d 792, 800 (9th Cir. 2003); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998).

Despite the general shift in the circuits following the 1991 amendment, the vacillation and uncertainty has persisted.

The Eleventh Circuit, for instance, ruled in 1997 that a retaliation claim was not cognizable under Section 1981, but one year later appeared to change its mind. *Compare Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) (dismissing Section 1981-based retaliation claim because there was no evidence presented that the retaliation was motivated by racial animus) *with Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1411* (11th Cir. 1998) (deciding that retaliation was cognizable under Section 1981). The Seventh Circuit has followed a similar path since the 1991 amendment. *Compare Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (7th Cir. 2005) ("§ 1981, in contrast, encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination . . .") *with Humphries*, 474 F.3d at 402 (recognizing that "our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions . . .," the court went on to "overrule our holding in *Hart* . . .").

There is confusion in other circuits. For instance, there is an apparent intra-circuit split in the Sixth Circuit. *Compare McCary v. Ohio Civil Service Employees Assoc.*, No. C2-99-995, 2000 U.S. Dist. LEXIS 21386, at *17 (S.D. Ohio Nov. 22, 2000) (citing *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984) and holding that "a claim of retaliation is not cognizable under" Section 1981) *with Wagner v. Merit Distribution*, 445 F. Supp.2d 899, 906 (W.D. Tenn. 2006) ("§ 1981 is an appropriate ground for . . . [plaintiff's] retaliation claim"); *Cf Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (not directly addressing the issue of retaliation under Section 1981, but observing that "it is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981.

. . for discrimination based upon his advocacy on behalf of minorities . . .").

REASONS FOR GRANTING THE WRIT

A. The Continued Vacillation and Uncertainty

This continued vacillation and uncertainty alone justifies review. *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (granting *certiorari* because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (*certiorari* granted "to forestall a possible conflict in the lower courts" on an "important" issue even though there was no "direct conflict" among various district court and court of appeals opinions). The time has come to settle the debate. Retaliation claims are being filed with greater frequency.[1] There is an apparent intra-circuit split in the Sixth Circuit. There are three other circuits that have not yet ruled on this issue. And, in those circuits that have found retaliation cognizable under Section 1981 since the 1991 amendments, the Seventh and Eleventh

---

[1] Over a ten year period, the number of EEOC retaliation charges for all statutes has risen from 18,198 in 1997, to 22,555 in 2006. *EEOC Charge Statistics*, http://www.eeoc.gov/stats/charges.html (last viewed April 18, 2007). The number of EEOC charges based on the explicit retaliation clause in Title VII have risen from 16,394 in 1997 to 19,560 in 2006. *Id.* In fact, retaliation claims brought under various statutes now account for 29.8 percent of all charges brought before the EEOC, whereas such charges only accounted for 22.6 percent of retaliation claims in 1997. And, retaliation claims now account for 25.8 percent of all charges brought pursuant to Title VII, compared with 20.3 percent in 1997. *Id.*

Circuits have demonstrated that any one of these circuits could at any time unpredictably reverse course.

The unpredictability and uncertainty surrounding this issue is starkly highlighted by Judge Edmondson's comment about his circuit's decision in *Andrews* finding retaliation cognizable under Section 1981 when, just one year earlier, another three judge panel had reached the opposite conclusion: "[b]y the way, this view-- whether accurate or inaccurate -- of the law seems to have been prevalent in the federal courts nationwide." *Andrews*, 140 F.3d at 1413. This "follow-the-leader" mentality breads the type of uncertainty and vacillation that has plagued this issue in the forty years since *Sullivan*. Further delay by this Court will only perpetuate the historical uncertainty and vacillation.

B. The Text of Section 1981 Does Not Make Race Retaliation Actionable

Further delay will also tacitly endorse a construction of this major federal statute that entirely ignores its text. There is no dispute that Section 1981, either in its pre-amended or post-amended form, does not mention retaliation or retaliatory termination. Virtually every court that has addressed the issue concedes this point. *See e.g. Humphries*, 474 F.3d at 399 ("after all, the specific word 'retaliation' still does not appear in section 1981 . . ."); *Evans v. Kansas City, Missouri School Dist.*, 65 F.3d 98, 101 (8th Cir. 1995) ("[s]ection 1981 has no specific retaliation provision . . ."). In the absence of any textual support, the Court below relied heavily, if not exclusively, on what it claims is the legislative history. The Seventh Circuit specifically claimed that "the legislative history confirms that Congress intended retaliation to be included within Section 1981." *Humphries*, 474 F.3d at 398. Other circuits have made similar claims. *See e.g.*

Hawkins, 163 F.3d at 693 ("legislative history supports the view that this definition was intended to encompass both a race-based failure to promote and retaliation for a complaint of such a failure to promote").

The "legislative history" that purportedly evinces Congress' intent consists of one excerpt from a House committee report. The excerpt provides, in relevant part, that "[t]he Committee intends this provision to bar all race discrimination in contractual relations . . . [,][which] would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630. Reliance on legislative history, particularly the legislative history from this committee report, is inappropriate for two reasons.

First, legislative history cannot be used as a substitute for the statutory text. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotations omitted) (Thomas, J.). Meaning is derived from the text, not legislative history. The text is preferred over legislative history because the latter is unreliable and misleading. For instance, legislative history, like committee reports, "has addictive consequences," leading jurists to naively believe "that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole - so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has expressed' thus-and-so." *Zedner v. United States*, 126 S.Ct. 1976, 1991 (2006) (Scalia, J., concurring). Worse yet, reliance on legislative history gives "unelected staffers and lobbyists . . . both the power and the incentive to

attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.). Legislative history is also subject to manipulation, conscious or otherwise. As Justice Kennedy explained in *Exxon Mobil*, for the jurist, "investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Id.* (internal quotations removed).

The text thus retains primacy when interpreting federal statutes. Legislative history should not and cannot be consulted in the face of "unambiguous text." *Arlington Central School Dist. Board of Educ. v. Murphy*, 126 S.Ct. 2455, 2463 (2006) (Alito, J.). Section 1981 is no exception. *Domino's Pizza, Inc. v. McDonald*, 126 S. Ct. 1246 (2006) (interpreting Section 1981 from a textualist perspective) (Scalia, J.). "The authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp.*, 545 U.S. at 568. And "[w]hatever temptations the statesmanship of policymaking might suggest, the judge's job is to construe the statute - not make it better." *Jones v. Bock*, 127 S. Ct. 910, 921 (2007) (Roberts, J.). If the statute needs to be made "better," that is a task for Congress, not the courts. *Interview with Chief Justice Roberts*, University of Miami (Nov. 13, 2006) (explaining the importance of constrained decision-making and noting that "[n]ot a single person has voted for me, and if we don't like what the people in Congress do, we can get rid of them, and you don't like what I do, it's kind of too bad . . ."). Had the Seventh Circuit (and the other circuit courts) followed this methodological approach to statutory interpretation, as this Court demands, it would have invariably concluded that retaliation is not cognizable under Section 1981. There is

simply nothing in the text of Section 1981(a) or (b) to support any other conclusion.

At its core, Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race." *Id.* at 1250. With the 1991 amendment, the phrase "make and enforce" now includes the making (which is not new), performing, modifying, and terminating (also not new) of a contract. In amending Section 1981, Congress did not strip it of its fundamental underpinnings, leaving intact the necessary motivational prerequisite to bringing a claim under this section. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994) ("*Patterson* did not overrule any prior decision of this Court"). Even though amended, therefore, an employer's conduct will not be actionable under Section 1981 unless its conduct was "racially motivated." *Runyon v. McCarey*, 427 U.S. 160, 168 (1976) ("[i]t is now well established that s 1 of the Civil Rights Act of 1866 . . . prohibits racial discrimination in the making and enforcement of private contracts"); *General Building Contr. Assoc.*, 458 U.S. at 389 ("§ 1981 reaches only purposeful discrimination"); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality"). From a textualist perspective, this means that, in the employment context, Section 1981 protects the equal right of all persons (or employees) without regard for race to make, perform, modify, and terminate a contract. Employer actions that are not racially motivated are necessarily lawful under Section 1981.

Retaliatory terminations are, of course, not racially motivated. *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 185 (2005) ("[a] claim of retaliation is not a claim of discrimination on the basis of [race]") (Thomas, J.,

dissenting). The motivation behind the retaliatory termination, by definition, is the protected activity, which in most situations is some form of complaint. *See e.g. Humphries*, 474 F.3d at 404 (to prevail on a retaliation claim, plaintiff must prove that there is a "causal connection between" the termination and the "protected activity"). The complaining party's race has nothing to do with the termination. In fact, under a retaliation theory, but for the employee's complaint, the employee, whether white or black, would not have been terminated. Under a discriminatory termination theory, on the other hand, but for the employee's race, the employee would not have been terminated. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (to prove discriminatory termination requires that the employee's race "actually played a role in the [decisionmaking process] and had a determinative influence on the outcome").

This obvious conceptual distinction between retaliatory termination and discriminatory termination was even accepted by the court below, which noted that "it may be that, strictly speaking, a discriminatory termination of a contract is not the same thing as a retaliatory discharge -- for instance, analytically, retaliation need not have a discriminatory intent behind it." *Humphries*, 474 F.3d at 398; *see also Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("retaliation and discrimination are separate wrongs"). Consequently, although a discriminatory termination is prohibited by Section 1981, a retaliatory termination is not. *Domino's Pizza*, 596 S.Ct. at 1249 ("Congress amended the statute . . . adding § 1981(b), which defines 'make and enforce' to bring post formation conduct, including discriminatory termination, within the scope of § 1981"). The text of the statute and the plain meaning of the terms in that statute demand this result. The legislative history cannot be used to reach a result that is not, at all, tethered to the text

of Section 1981. The Seventh Circuit obviously decided to ignore this basic tenet of Supreme Court jurisprudence, providing yet another reason for granting *certiorari*. *Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 129, 130 (1959) (granting *certiorari* because the decision below "appeared to be in conflict with our precedents"); Rehnquist, THE SUPREME COURT - HOW IT WAS, HOW IT IS 265 (1987) (recognizing that, in determining whether to grant *certiorari*, "another important factor is the perception of one or more justices that the lower court decision may well have been an incorrect application of Supreme Court precedent").

There is a second and more obvious reason that reliance on the legislative history is inappropriate: the "legislative history" in this case actually contradicts the Seventh Circuit's holding. Congress was certainly aware of the interpretive norm employed by the Court at the time it amended Section 1981. *Humphries*, 474 F.3d at 411 (Easterbrook, J., dissenting). For instance, *Patterson*, the very case that Congress sought to address with the 1991 amendment, was the product of a strict text-based interpretation. *See e.g. Patterson*, 491 U.S. at 176 (construing Section 1981 by looking to "its plain terms . . ."); *Humphries*, 474 F.3d at 395 (recognizing that *Patterson* "severely curtailed the reach of section 1981 claims"). Yet Congress failed to include retaliation in the text of subsection (b), no doubt realizing that it would not be read into the statute by a Court that abandoned some time ago judicial extrapolation of federal statutes. Moreover, the House committee report that supposedly shows the intent of Congress delineated the types of employer actions that would be covered by the new subsection (b). Not one of these actions is mentioned in the amended Section 1981, again, despite the very real possibility that the prevailing interpretive norm would prevent these words from being read into the amended version of Section 1981.

Perhaps most revealing is the explicit inclusion by Congress of retaliation in other federal employment statutes. Both before and after the 1991 amendment, Congress has included explicit retaliation provisions in a number of other statutes governing employment including Title VII, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Family and Medical Leave Act of 1993, and the Uniformed Services Employment and Reemployment Rights Act of 1994. This is telling because "when Congress intends to include a prohibition against retaliation in a statute, it does so." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 190 (2005) (Thomas, J., dissenting). These peculiar facts lead to only one logical conclusion: whether the product of compromise or a change-of-heart, Congress in 1991 did not intend to include retaliation in Section 1981.

With no support in the text or the legislative history, the Seventh Circuit and the courts that preceded it have reached a conclusion that is simply wrong. An erroneous construction of a major federal statute, particularly one that strays so far afield from this Court's precedents and interpretive norms cannot stand. The Court should thus exercise its supervisory authority and grant *certiorari*. *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) ("[a]s the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation") (Stevens, J., dissenting); *Elder v. Holloway*, 510 U.S. 510, 505 (1994) (granting *certiorari* where the decision below "seemed to be out of line with the authorities").

C. The Seventh Circuit's Holding Effectively Eviscerates Several Portions of Title VII

Title VII has several unique features not shared with Section 1981. *Humphries*, 474 F.3d at 409 ("§ 1981 and Title VII have different but overlapping provisions . . .") (Easterbrook, dissent). Title VII has an exhaustion requirement and an administrative conciliation and mediation process. It has two interrelated statute of limitations periods. It also imposes caps on damages. And, perhaps most importantly, Title VII established an administrative agency, the Equal Employment Opportunity Commission, to "protect the public interest and further our national initiative against employment discrimination . . . ." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1998). Section 1981 contains none of these features.

The Seventh Circuit's holding quite obviously allows would-be plaintiffs to circumvent these features of Title VII by reading "§ 1981 to have the same substantive content as Title VII, but without [the] features" that "Congress thought necessary." *Humphries*, 474 F.3d at 409. The Respondent in this case did just that after missing the filing deadline under Title VII. *Id.* at 389. And, as Judge Easterbrook astutely pointed out below, "[t]his is not the first time a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII." *Id.* at 409. If the Seventh Circuit's decision is not reversed, employees will be able to bypass the EEOC and go right to court long after Title VII's statute of limitations period has run, without any meaningful opportunity for conciliation and mediation. This would not be inconsequential. Since 1997, the EEOC has successfully conciliated over 4000 disputes. *EEOC Charge Statistics,* https://www.eeoc.gov/stats.html (last viewed April 18, 2007). Another 10,881 disputes were otherwise settled with the

EEOC during that same time period. *Id.* The Seventh Circuit's decision could flood the federal courts with cases that might have been resolved at the administrative level.

Patterson advises against a construction of Section 1981 that facilitates such a result. *Patterson*, 491 U.S. at 182 ("[w]e should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute"). This is particularly true where the circumvented statute provides coverage, as is the case here. *Id.* ("the availability of the latter statute [Title VII] should deter a tortuous construction of the former statute [Section 1981] to cover this type of claim"). Courts must not be permitted to "undo the work of Congress . . ." based on one statement in one committee report. *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 459. Indeed, as this Court has made clear, "repeals by implication are not favored," permissible only when "the two statutes are in irreconcilable conflict." *Branch v. Smith*, 538 U.S. 254, 272 (2003). As already explained above, Title VII and Section 1981 are not in irreconcilable conflict. The two are only in conflict because of the circuit courts' atextual and unacceptably "tortuous" interpretation of Section 1981. This Court should grant *certiorari* and put an end to the senseless conflict by articulating a proper textual application of Section 1981.

CONCLUSION

A writ of *certiorari* should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals. If *certiorari* is not granted, the Court runs the risk of perpetuating the vacillation and uncertainty that has plagued this issue for forty years. The Court would also run the risk of tacitly endorsing an atextual construction of a

major federal statute that "demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court." *Humphries*, 474 F.3d at 409.

Respectfully submitted,

MICHAEL W. HAWKINS
MICHAEL J. NEWMAN
Counsel for Petitioner
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, Ohio 45202
Telephone: (513) 977-8200
Facsimile: (513) 977-8141
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Date: April 25, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-4047

[Filed January 29, 2007]

HEDRICK G. HUMPHRIES,)
Plaintiff-Appellant,)
)
v.)
)
CBOCS WEST, INC.,)
Defendant-Appellee.)
)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03-C-3765
Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing filed by Defendant-Appellee on January 24, 2007, all members of the original panel have voted to Deny the petition for rehearing.

Accordingly, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-4047

[Filed January 10, 2007]

HEDRICK G. HUMPHRIES, *Plaintiff-Appellant*,

v.

CBOCS WEST, INC., *Defendant-Appellee*.

OPINION

WILLIAMS, *Circuit Judge*. Hedrick Humphries filed a suit alleging claims of discrimination and retaliation under Title VII and 42 U.S.C. § 1981 against CBOCS West, Inc., based upon his discharge as an associate manager at one of defendant's Cracker Barrel restaurants. After dismissing Humphries's Title VII claims as procedurally barred, the district court granted summary judgment in favor of CBOCS West, Inc. (hereinafter "Cracker Barrel"), holding that Humphries could not establish his prima facie burden of showing that a similarly situated individual in a non-protected class was treated more favorably. We reverse the district court's grant of summary judgment as to Humphries's

retaliation claim because Humphries made a sufficient showing under the indirect method to establish a prima facie case of retaliation under section 1981. We affirm the judgment as to Humphries's discrimination claim because Humphries forfeited this claim by failing to present an adequate argument before the district court.

I. BACKGROUND

The following facts are recounted in the light most favorable to Humphries, the non-movant. Humphries, an African-American male, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Associate managers at Cracker Barrel are supervised by a general manager, who in turn is supervised by a district manager. In this case, three general managers cycled through during Humphries's three-year tenure: Don Sessions, Steve Cardin and Ken Dowd. His performance during his first two-and-a-half years (roughly February 1999 through mid-July 2001) was generally excellent. For instance, he received annual merit raises and bonuses, and his supervisor (Sessions) testified that he considered Humphries to be his best associate manager. Circumstances changed for Humphries when Cardin took over (as a temporary replacement) for Sessions. According to Humphries, Cardin routinely made racially derogatory remarks, such as stating that all African-Americans are "drunk or high on drugs" or that "all Mexicans have a bunch of kids." Humphries alleges that other employees confirmed Cardin's inappropriate comments, and told Humphries that Cardin had stated that he was there "for the white people" and was "going to take care of the white people."

Within Cardin's initial month of being the general manager, he issued Humphries five disciplinary reports,

called Employee Counseling Reports (ECRs). The ECRs covered a wide range of alleged misconduct, including bank deposit shortages and inappropriate use of Gold Cards to provide complaining customers a free meal. Humphries claims that the ECRs were groundless and reflected Cardin's racial animus. In response, in August or September 2001, Humphries complained to Cardin's supervisor, district manager William Christensen. Christensen, however, appears not to have conducted any investigation of Humphries's claims, contrary to Cracker Barrel policies.

In September 2001, Ken Dowd became general manager (Cardin returned, as planned, to his store). Shortly thereafter, Joe Stinnett, one of Humphries's fellow associate managers, fired an African-American food server, Venis Green, because she purportedly failed to show up for a shift. Humphries complained to both Dowd and Christensen that Stinnett's firing of Green was discriminatory because, among other things, Green had informed both Humphries and another associate manager that she could not work that shift. Moreover, according to Humphries, a white employee had failed to appear at work on several occasions without notice, but was not fired. Humphries also reminded Christensen of his earlier complaints regarding former-general manager Cardin. According to Humphries, Christensen berated him for "going outside the management group" (i.e., turning to Christensen, rather than Dowd, to complain) and demanded that Humphries schedule a meeting with Dowd for the following week.

This scheduled meeting never occurred because on December 5, 2001 (the day before Humphries's scheduled meeting with Dowd), Christensen fired Humphries, based upon Stinnett's complaint that Humphries had left the store safe unlocked during the evening -- a charge that Humphries

disputes. Humphries also claims that prior to his firing (and before his alleged failure to lock the safe), a cashier warned him that he should watch himself because Christensen and Stinnett were "up to something." After being informed by Stinnett that Humphries had left the safe unlocked, Christensen immediately terminated Humphries - without interviewing him or investigating the incident to determine whether Humphries had actually left the safe open.

Humphries subsequently brought claims of discrimination and retaliation under Title VII and section 1981. The district court dismissed Humphries's Title VII claims due to procedural deficiencies (and Humphries does not appeal this determination). The district court also granted summary judgment in favor of Cracker Barrel on Humphries's section 1981 claims, finding that Humphries failed to establish his prima facie case under either the direct or indirect method. Humphries now appeals.

II. ANALYSIS

A. Historical Overview of Retaliation Claims under Section 1981

Before we turn to the merits of this appeal, we must decide whether Humphries's retaliation claim is cognizable under section 1981. Although Cracker Barrel failed to raise this issue in the district court, it now claims that our decision in *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), precludes Humphries's retaliation claim. In the normal course, when a party fails to present an argument in the trial court, it forfeits the argument on appeal. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 728 (7th Cir. 2004); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990). At oral argument, counsel

for Cracker Barrel explained that he did not raise this issue in the district court because *Hart*, which he contended created a change in the law in this circuit, had not yet been issued. Although (as we will explain later), we do not believe that *Hart* changed our jurisprudence regarding section 1981 retaliation claims, we will not penalize Cracker Barrel for failing to raise its argument below.[1]

Of course, we retain the right to consider forfeited arguments, and may choose to do so "in the interests of justice." *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998); *see also Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993) (holding that "[i]n the rare case in which failure to present a ground to the district court has caused no one -- not the district judge, not us, not the appellee -- any harm of which the law ought to take note, we have the power and the right to

---

[1] We note that there is some confusion in this circuit as to whether an appellee -- as opposed to an appellant -- who failed to raise to a particular argument in the district court in support of his motion for summary judgment is precluded from raising new arguments in this court to affirm the district court's ruling. *Compare, e.g., Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (holding that appellees waived a claim by failing to raise it in the district court), *and Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir. 1992) (same), *with Transamerica Ins. Co. v. South*, 125 F.3d 392, 399 (7th Cir. 1997) ("We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmance is a privilege rather than a duty." (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996))). We need not resolve this question because we choose to review this issue, irrespective of whether Cracker Barrel forfeited the issue or not.

permit it to be raised for the first time to us"). In this instance, given that our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions, it is in the interests of justice to clarify the issue of whether retaliation claims are cognizable under section 1981 (and, in so doing, clarify our ruling in *Hart*). *See Amcast*, 2 F.3d at 749-50 (reaching issue not raised below because it was fully briefed on appeal, rested "entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review, which is plenary on matters of law[, and] there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now."); *Mass. Bay Ins. Co.*, 136 F.3d at 1122 (reaching forfeited choice-of-law issue because "we clearly think it is in the interest of justice to insure that district courts conduct choice-of-law analyses when conflicts questions are presented to them").

1. Section 1981's Origin in the Civil Rights Act of 1866

The language codified in section 1981 derives from section 1 of the Civil Rights Act of 1866, a Reconstruction-era statute that is generally recognized as the first significant civil rights legislation enacted by Congress, and is considered the "initial blueprint of the Fourteenth Amendment." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982); *see generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-37, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968) (discussing legislative history and historical context of the Civil Rights Act of 1866); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 711-22, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989)(same); *Patterson v. McLean Credit Union*, 491 U.S. 164, 192-200, 109 S. Ct.

2363, 105 L. Ed. 2d 132 (1989) (Brennan, J., concurring in part and dissenting in part) (same); Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 Yale L.J. 565 (1989). The legislative history of the Civil Rights Act of 1866 is complicated -- and not without substantial interpretive disagreement. *See generally* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303. The Civil Rights Act of 1866 was passed pursuant to section 2 of the Thirteenth Amendment, which provided Congress with the legislative power to enforce the Thirteenth Amendment's prohibition on slavery. U.S. Const. amend. XIII, § 2. The Act was a direct response to the so-called "Black Codes," a series of legislative acts by many southern (and some northern) states in protest of, and as a tacit attack upon, the recently enacted Thirteenth Amendment. The Black Codes imposed onerous legal limitations on newly-freed former slaves in an attempt to circumvent the requirements of the Thirteenth Amendment, and essentially continued a pattern of legal enslavement. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70, 21 L. Ed. 394 (1873) (noting that following the passage of the Thirteenth Amendment, "[a]mong the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value"); *see generally* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 Harv. J. on Legis. 187, 240-46 (2005) (discussing the Black Codes).

In response to the states' attempts to circumvent the requirements of the Thirteenth Amendment, section 1 of the Civil Rights Act of 1866 conferred a series of legal rights, including the right to contract, and to hold and convey property, equally to citizens.[2] Portions of section 1 are now codified in section 1981, which states, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

---

[2] In 1870, after ratification of the Fourteenth and Fifteenth Amendments, Congress re-enacted the Civil Rights Act of 1866 (via the Enforcement Act of 1870), and then codified it in sections 1977 and 1978 of the Revised Statutes of 1874. The 1870 re-enactment, which followed passage of the Fourteenth Amendment, has caused significant debate regarding whether sections 1981 and 1982 apply to private actors or, instead, are limited to state actors, pursuant to the Fourteenth Amendment. *Compare, e.g., Jones*, 392 U.S. at 436 (concluding that "it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent re-adoption of the Civil Rights Act were meant somehow to limit its application to state action"), *and Runyon v. McCrary*, 427 U.S. 160, 168-69 n.8, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) (same), *with Jones*, 392 U.S. at 449-76 (Harlan, J., dissenting) (evaluating the legislative history and concluding that the Act was intended to reach only state actors), *and Runyon*, 427 U.S. at 195-205 (White, J., dissenting) (same). In any event, it is now well-settled that section 1981 applies to private actors. *See Patterson*, 491 U.S. at 171-76 (refusing to overturn *Runyon*'s determination that section 1981 applied to private conduct).

42. U.S.C. § 1981(a). Other portions of section 1 are now codified in section 1982, which states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

2. *Sullivan v. Little Hunting Park, Inc.* Leads Courts To Conclude that Section 1981 Protects Against Retaliation

The Supreme Court has interpreted section 1981 as providing a broad-based prohibition (and federal remedy) against racial discrimination in the making and enforcing of contracts. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-62, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). The issue of what types of adverse actions are subsumed under the "make and enforce contracts" provision in section 1981 is not without complication, particularly with respect to so-called "postformation conduct" (i.e., adverse acts, such as harassment or retaliation, that occur after an initial contractual relationship has been established). Before its decision in *Patterson*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (which we shall address below), the Supreme Court had not clearly determined whether section 1981 applied to retaliatory conduct. The closest it came to deciding this issue was in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). In *Sullivan*, a Virginia nonprofit corporation, created to operate a community park and playground facilities for the benefit of residents, refused a proposed assignment of

a membership interest to an African-American man. *Id.* at 234-35. The white homeowner who intended to assign his membership interest protested the corporate board's refusal, and the board expelled him from the corporation. *Id.* at 235. He, along with the would-be assignee, brought suit under sections 1981 and 1982. *Id.* The Court initially noted the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived." *Id.* at 237. Relying on the broad protective nature of the Civil Rights Act of 1866, the Court held that the white homeowner had standing to bring a claim under section 1982 (the companion statute to section 1981 pertaining to property rights):

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S. Ct. 1031, 1036, 97 L. Ed. 1586, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

Id. at 237. Although the *Sullivan* court did not explicitly use the term "retaliation" in its decision, it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another (i.e., he had been "punished for trying to vindicate the rights of minorities"). *Id.* (And, indeed, as will be discussed further below, the Supreme Court later interpreted *Sullivan* precisely in this

manner in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).)

Following *Sullivan*, and prior to *Patterson*, the general consensus among the circuits was that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including "postformation" adverse acts, such as retaliation. *See, e.g.*, *Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 42-43 (2d Cir. 1984) (retaliation cognizable under section 1981); *Goff v. Continental Oil Co.*, 678 F.2d 593, 597-99 (5th Cir. 1982) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981) (same); *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981) (same). This court, however, did not definitively decide this issue in the pre-*Patterson* era. *See Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989) (noting that although "[t]here is a substantial body of court of appeals precedent" holding that section 1981 forbids retaliation, there was "nothing in this circuit").

3. *Patterson v. McLean Credit Union* Narrows the Reach of Section 1981

In 1989, the Supreme Court issued its decision in *Patterson*, which severely curtailed the reach of section 1981 claims. The *Patterson* court held that section 1981 protections applied exclusively to two types of rights: the right to make contracts and the right to enforce them. 491 U.S. at 176. The first right is violated by a "refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Id.* at 177. Importantly, however, that right "extends only to the formation of a contract, but not to problems that may arise later from the conditions of

continuing employment." *Id.* at 176. The second right, the right to enforce contracts, "does not. . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.* at 177-78. Thus, section 1981's prohibition did not include so-called "postformation" discriminatory conduct of an employer, including the breach of the terms of the contract or imposition of discriminatory working conditions, such as racial harassment. *Id.* at 178-82. *Patterson*, however, was silent as to the issue of retaliation.

Even though *Patterson* involved only racial harassment and the term "retaliation" appears nowhere in the opinion, several circuits -- including this one -- interpreted *Patterson* as precluding retaliation claims under section 1981 because such employer behaviors purportedly involved now-unprotected postformation conduct. *See, e.g., Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *Carter v. South Cent. Bell*, 912 F.2d 832, 838-41 (5th Cir. 1990); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 & n.17 (11th Cir. 1990); *Gersman v. Group Health Ass'n, Inc.*, 289 U.S. App. D.C. 332, 931 F.2d 1565 (D.C. Cir. 1991); *see also Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) (noting that *Patterson* "marked a dramatic change in § 1981 jurisprudence"); *but see Hicks v. Brown*, 902 F.2d 630, 635-38 (8th Cir. 1990) (holding that *Patterson* did not address retaliation claims and should not be read as foreclosing such claims under section 1981). In the immediate aftermath of *Patterson*, we decided *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), in which we observed that "*Patterson* might be thought to foreclose any suggestion that retaliation could be actionable under" section 1981. *Malhotra*, 885 F.2d

at 1312. Specifically, we noted that "retaliation and discrimination are separate wrongs. A white person who opposes discrimination against blacks and is fired in retaliation for doing so is not being discriminated against because of his race. . . ." *Id.* (citations omitted). At the same time, we also observed that "it can be argued that someone who retaliates against a person who has a claim of employment discrimination that might be actionable under section 1981 ... is interfering with the person's *ability* to make or enforce contracts on the same footing with white persons and such interference could be thought itself a violation of section 1981." *Id.* at 1313 (citations omitted) (emphasis in original). Of particular note here, we did not decide whether *Patterson* definitively precluded retaliation claims, and even hinted that such claims "may well survive *Patterson*." *Id.*

In a concurring opinion in *Malhotra*, Judge Cudahy concluded that *Patterson* did not preclude retaliation claims.[3] Specifically, Judge Cudahy observed that there was "little parallel between harassment and retaliation. Hence, the refusal of *Patterson* to countenance harassment claims under section 1981 has only the most superficial application to claims for retaliation."[4] *Id.* at 1314 (Cudahy, J., concurring);

---

[3] *See also Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1053 (7th Cir. 1991) (suggesting that *Patterson* may not have foreclosed all retaliation claims).

[4] Judge Cudahy also noted that "to the limited extent *Patterson* is relevant here, it would appear to *support* the recognition of a cause of action for retaliatory conduct" because the *Patterson* court recognized that section 1981's right to "enforce contracts" prohibits efforts to "impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding

see also Hicks, 902 F.2d at 635-38 (holding that *Patterson* applied solely to the unique context of racial harassment and did not preclude retaliation claims). And, in prescient comments that anticipated the Supreme Court's result in *Jackson*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361, Judge Cudahy stated:

> A prohibition against retaliation is a necessary adjunct to the anti-discriminatory provision itself. If an employee may be fired for complaining of discrimination, his right not to be discriminated against is surely vitiated. . . . The recognition of a right of action for retaliation under section 1981 is simply another application of a straightforward syllogism: if an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those rights, since this would allow the employer to take away a right to protection conferred by statute.

Id. at 1314-15.

Judge Cudahy's view in *Malhotra* did not carry the day in this circuit during the brief post-*Patterson* era. Shortly thereafter, we issued our *McKnight* decision, where we, like most other circuits, interpreted *Patterson* as foreclosing section 1981 coverage of retaliation claims. *See McKnight*,

---

obligations." *Malhotra*, 885 F.2d at 1314 n.1 (citations omitted). "Clearly, when an employer punishes an employee for attempting to enforce her rights under section 1981, this conduct 'impairs the employee's ability to enforce her contract rights.'" *Id.* This is an intriguing argument, but one that we need not revisit in light of our conclusion that retaliation claims are now covered under section 1981's "make and enforce contracts" provision.

908 F.2d at 107-08; *see also Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1471-72 (7th Cir. 1993); *McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 688 (7th Cir. 1991). *But see Hicks*, 902 F.2d at 635-38 (holding that *Patterson* did not foreclose retaliation claims). In *McKnight*, the plaintiff brought suit under section 1981 and Title VII, claiming that his employer had discriminated against him based on his race and had fired him in retaliation for complaining about the discrimination. *McKnight*, 908 F.2d at 107-08. Although we noted that "*Patterson* was a racial-harassment case rather than a discharge case," we nonetheless held that *Patterson*'s "wide-ranging reexamination of section 1981 indicated (as it seems to us) that claims of racially motivated discharge are not actionable under that statute." *Id.* at 108.

Judge Fairchild, however, concurred and dissented in part from the majority's opinion, because, in his view, *Patterson* "did not expressly assert that a racially discriminatory termination would not be a violation of § 1981." *Id.* at 117. Instead, he reasoned that the analysis in *Patterson* was limited to the narrow issue of whether a change in the conditions of employment following the formation of the employment contract (specifically, racial harassment) -- but not a termination -- violated section 1981. *Id.* As a result, Judge Fairchild concluded that the right to make contracts established in section 1981 protected "the right to continue to work, in the face of racially discriminatory termination" -- a result unaltered by *Patterson*. *Id. But see Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) (noting that "*Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect*." (emphasis in original)).

4. The Civil Rights Act of 1991 Supersedes *Patterson*

Whether the majority opinion in *McKnight* or Judge Cudahy's or Judge Fairchild's reading of *Patterson* was correct is now irrelevant because *Patterson* 's influence was short-lived. Unhappy with the result issued in *Patterson*, Congress legislatively superseded the *Patterson* decision by enacting the Civil Rights Act of 1991. *See Rivers*, 511 U.S. at 305-06, 305 n.5 (noting that the Civil Rights Act of 1991 was based on Congressional and Presidential disapproval of the *Patterson* decision); *Walker v. Abbott Labs.*, 340 F.3d 471, 475 (7th Cir. 2003) (noting that "Congress, however, quickly responded [to *Patterson*] with the Civil Rights Act of 1991, which, *inter alia*, overruled *Patterson*"). The legislative history of the Civil Rights Act of 1991 makes clear that Congress was dissatisfied with the Supreme Court's narrow reading of section 1981, which strongly curtailed claims that had been cognizable in the pre-*Patterson* period. *See Rivers*, 511 U.S. at 306 n.6 (citing S. Rep. No. 101-315, pp. 12-14 (1990)). Among other things, Congress added subsection (b) to section 1981, which made clear that section 1981 was to be read broadly to include all aspects of the contractual relationship between parties, including the postformation conduct, which *Patterson* had concluded was not actionable under section 1981:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981(b). And the legislative history pertaining to this subsection confirms that Congress intended retaliation to

be included under this provision. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 n.12 (11th Cir. 1998) (citing H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 630, which states, in part, "[t]he list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring." (emphasis added)).

The Civil Rights Act of 1991 led several circuits to reverse course (again) and to allow retaliation claims under section 1981. *See Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Andrews*, 140 F.3d at 1412-13; *see also Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (8th Cir. 1996) (listing the elements for a *prima facie* case of retaliation under section 1981). For instance, in *Andrews*, the Eleventh Circuit noted that prior to *Patterson*, circuits interpreting section 1981's "make and enforce contracts" provisions had held that it "encompassed an employee's claims for an employer's race-based retaliation during the employment contract." 140 F.3d at 1410. It observed that while *Patterson* "drew into question many circuit court decisions recognizing post-hiring discrimination claims under section 1981," the Civil Rights Act of 1991 reversed whatever limits *Patterson* placed on imposing liability for postformation conduct. *Id.* at 1410-12. As a result, the Eleventh Circuit concluded that retaliation claims remained viable under section 1981. *Id.* at 1412.

B. Humphries's Retaliation Claim Is Cognizable Under Section 1981

1. We Hold that Section 1981 Protects Against Retaliation

This is the first opportunity we have had since the enactment of the Civil Rights Act of 1991 to revisit the issue of whether section 1981 forbids all retaliatory discharge claims.[5] Cracker Barrel contends that our decision in *Hart* has already foreclosed retaliation claims under section 1981. *See Hart*, 426 F.3d at 866. This is incorrect. Unfortunately, *Hart* has already been cited for this inaccurate proposition. *See Williamson v. Denk & Roche Builders, Inc.*, No. 04 C 4051, 2006 WL 1987808, at *4 (N.D. Ill. July 11, 2006) (citing *Hart* for the proposition that "the Seventh Circuit has made clear that a retaliation claim is not viable under Section 1981");

Franklin v. U.S. Steel Corp., No. 2:04 CV 246, 2006 U.S. Dist. LEXIS 17802 at *6, 2006 WL 905914, at *2 (N.D. Ind. Apr. 7, 2006) (same); *Welzel v. Bernstein*, 436 F. Supp. 2d 110, 117 (D.D.C. 2006) (citing *Hart* for the proposition that this circuit, unlike other circuits, precludes retaliation claims under section 1981). Our analysis in *Hart* was limited to the narrow issue of whether an individual who was *not* the subject of discrimination could assert claims of

---

[5] In *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 n.2 (7th Cir. 1993) we noted that the Civil Rights Act of 1991 had "overruled" *Patterson*, but nonetheless applied the holding of *Patterson* because the Civil Rights Act of 1991 did not have retroactive reach. We also noted, however, that, as a result, "this case represents one of the few in which we still apply the *Patterson* standards." *Id.*

retaliation for complaining about the discrimination of others.[6] We held that section 1981 did not protect against retaliation in such circumstances. *Hart*, 426 F.3d at 866. But *Hart* has no application to the facts here, where the plaintiff is plainly asserting retaliation stemming from discriminatory acts targeting him. (And, as we shall see below, even *Hart*'s limited holding is no longer good law in light of the Supreme Court's *Jackson* decision.)

Thus, the issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the "termination of contracts," and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract.[7] Indeed, the Supreme Court subsequently interpreted the amended provisions of section 1981 as protecting against "discriminatory contract terminations." *Rivers*, 511 U.S. at 302 (stating that "Section 101 of that Act provides that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations"). Now, it may be that, strictly speaking, a discriminatory "termination of contract" is not the same thing as a retaliatory

---

[6] Our decision in *Hart* was initially issued as an unpublished order, but, upon motion to publish it filed by a member of the bar, the order was converted to a published opinion.

[7] The at-will nature (i.e., no formal written contract and no specific terms of employment) of the plaintiff's employment here does not preclude the plaintiff from relying on section 1981's provisions pertaining to contracts. *See Walker*, 340 F.3d at 475-77 (holding that at-will employees can state claims under section 1981).

discharge -- for instance, analytically, retaliation need not have a discriminatory intent behind it. *See Malhotra*, 885 F.2d at 1312; *Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting). But the Civil Rights Act of 1991 dispensed with this heightened degree of formalism, and the legislative history confirms that Congress intended retaliation to be included within section 1981. *See Andrews*, 140 F.3d at 1411 n.12. As a result, whatever concerns *Patterson* raised about the postformation nature of retaliatory discharges evaporated with the passage of the Civil Rights Act of 1991. *See id.*; *Rivers*, 511 U.S. at 306 n.6. *But see Rivers*, 511 U.S. at 309 n.8 (noting that the "legislative history of the 1991 Act reveals conflicting views about whether § 101 would 'restore' or instead 'enlarge' the original scope of § 1981") and *id.* at 305 ("A legislative response does not necessarily indicate that Congress viewed the judicial decision as 'wrongly decided' as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law -- or it may be altogether indifferent to the decision's technical merits -- but may nevertheless decide that the old law should be amended, but only for the future.").

2. Our Holding Is Consistent with *Jackson v. Birmingham Board of Education*, which Affirmed *Sullivan* 's Continuing Validity

Even if the statute were unclear on this issue -- after all, the specific word "retaliation" still does not appear in section 1981[8] -- and without turning to the pertinent legislative

---

[8] *Cf.* 42 U.S.C. § 2000e-3(a) (Title VII) (providing that it is an "unlawful employment practice" for an employer to retaliate against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII], or because he has

history, the Supreme Court's recent decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) compels the same result. In *Jackson*, the male coach of a girls' high school basketball team sued the Birmingham Board of Education under Title IX of the Education Amendments of 1972, claiming that the Board retaliated against him for complaining about sex discrimination in the high school's athletic program. *Id.* at 171. Title IX prohibits sex discrimination by recipients of federal education funding, but, like section 1981, it contains no express mention of "retaliation." *Id.* at 173. Instead, Title IX simply prohibits "discrimination." The Supreme Court, however, determined that Title IX's proscription on discrimination necessarily subsumed (and implied) acts of retaliation, which it viewed as simply different forms of discrimination:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional

---

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.").

> "discrimination" "on the basis of sex," in violation of Title IX.

Id. at 173-74 (citations omitted) (emphasis in original).

The *Jackson* court relied heavily on its prior decision in *Sullivan*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386, where it held that section 1981's companion statute, section 1982, which prohibits discrimination with respect to property rights, contained an implied prohibition against retaliation. *Jackson*, 544 U.S. at 176. Specifically, the *Jackson* court interpreted *Sullivan* as holding that section 1982's general prohibition on racial discrimination, which, like section 1981, makes no mention of retaliation, nonetheless covered "retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* The *Jackson* court also observed that the statutory objective of preventing discrimination would be severely hampered if retaliatory practices were not also banned: "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* at 180 (citing *Sullivan*, 396 U.S. at 237). "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.*

Thus, the Jackson court appears to have jettisoned our prior observation that "retaliation and discrimination are separate wrongs." *Cf. Malhotra*, 885 F.2d at 1312; *see Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting)(noting that "[a] claim of retaliation is not a claim of discrimination on the basis of sex" and that "[r]etaliation therefore cannot be said to be discrimination on the basis of anyone's sex, because a retaliation claim may succeed where no sex discrimination ever took place"). Instead, at least for the purpose of

interpreting broad statutory discrimination prohibitions that omit specific retaliation provisions, the Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination. *See Jackson*, 544 U.S. at 175 (distinguishing between the structure of Title VII, which includes express retaliation provisions, and Title IX's "implied" cause of action). Moreover, the *Jackson* court noted that a statute targeting discrimination would necessarily be undercut if retaliatory acts evaded its purview. *Id.* at 180. And although *Jackson* directly targeted Title IX, there is no meaningful analytic distinction that renders the conclusion in *Jackson* inapplicable to section 1981.[9] That is, like Title IX, section 1981 broadly prohibits discrimination (although only Title IX, enacted roughly a century after section 1981, contains the more contemporary term of "discrimination"),

---

[9] Our colleague in dissent argues that the analysis in *Jackson* was particularized to Title IX and thus not applicable to our discussion of section 1981. We disagree. In *Jackson*, the Supreme Court relied in large part upon *Sullivan*, a case concerning section 1982. *See, e.g.*, *Jackson*, 544 U.S. at 176 ("Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides valuable context for understanding the statute."); *id.* at 177 ("Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is discrimination on the basis of sex, just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race."). Therefore, *Jackson*'s reasoning did not depend upon features unique to Title IX, and *Jackson* has implications for cases involving section 1982 and its companion statute -- section 1981. Moreover, the *Jackson* Court's reliance upon *Sullivan* affirms *Sullivan*'s continuing validity. Irrespective of our impression of *Sullivan*'s interpretive method, then, we are bound by its holding. That holding, in part, leads us to conclude (as has every circuit to address the question) that a retaliation claim is cognizable under section 1981.

fails to list specific discriminatory practices, and omits specific references to retaliation. *See id.* at 175-76.

Indeed, the fact that Title IX omitted any mention of retaliation, even though it was enacted in 1972, eight years after Title VII and its specific inclusion of retaliation provisions, did not trouble the *Jackson* court nor lead it to conclude that Congress must have intended to exclude retaliation from Title IX's coverage. *See id.* To the contrary, the Court looked to its *Sullivan* decision (which was issued three years before the passage of Title IX) and concluded that it provided "a valuable context for understanding" Title IX. *Id.* at 176. Specifically, the Court stated "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]." *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)).

Thus, the foundation of the *Jackson* decision is built squarely upon the Court's prior determination in *Sullivan* that section 1 of the Civil Rights Act of 1866 was intended as a broad prohibition on discrimination that contained an implied cause of action for retaliation. *Id.*; *see Sullivan*, 396 U.S. at 237 ("A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived."). And there can be no doubt that *Sullivan*'s examination of section 1982 with respect to implied prohibitions on retaliation readily applies to its companion statute, section 1981, given that sections 1981 and 1982 are simply carve-outs of the same section of the Civil Rights Act of 1866, sharing identical historical origins and concerns. *See, e.g.*, *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384,

102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982) (noting the shared legislative history between section 1981 and its "companion" section 1982); *Runyon*, 427 U.S. at 170-71 (noting that the holding in *Jones*, 392 U.S. at 437 pertaining to section 1982 necessarily implicated section 1981, given their shared legislative history); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 440, 93 S. Ct. 1090, 35 L. Ed. 2d 403 (1973) (holding that "[i]n light of the historical interrelationship" between sections 1981 and 1982, there was no reason to construe the sections differently solely on the basis that the defendant was a private party); *see also Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (holding that "in view of both Sections 1981 and 1982 being derived from the Civil Rights Act of 1866 and in view of the similarity in language and intent, no reason is seen not to apply the rationale of *Sullivan* in interpreting Section 1981"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 n.9 (2d Cir. 1975) (same).

3. Our Holding Is Sensible and Aligned with the Weight of Authority

Accordingly, we join the other circuits that have addressed this issue in the post-Civil Rights Act of 1991 era -- all of whom uniformly conclude that retaliation claims are cognizable under section 1981. *See Foley*, 355 F.3d at 339; *Hawkins*, 163 F.3d at 693; *Andrews*, 140 F.3d at 1410-11; *Barge*, 87 F.3d at 259. Not only is this result compelled by the Civil Rights Act of 1991 and corresponding Supreme Court authority, but it is also the sensible result. To hold that section 1981 allows unfettered retaliation is to invite wholesale circumvention (and eventual undermining) of the statute, and it would create perverse incentives for the employer to fire complainants as quickly as possible to thereby limit (or entirely avoid) damages under section 1981.

See, e.g., *Goff*, 678 F.2d at 598 (noting that "Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute"). This is not an insignificant issue, as section 1981 damages often have more teeth than those available under Title VII.

There is no traction in observing that Title VII provides a back-up or competing statutory regime to the plaintiff. *See generally Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir. 2004) (noting the significant overlap and differences in the two statutory schemes). Although the substantive overlap and procedural inconsistencies between section 1981 and Title VII animated the Court's concerns in *Patterson*, Congress is not bothered by this parallel statutory scheme. *See Johnson*, 421 U.S. at 459 ("'[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.'" (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 at 48, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) and H.R. Rep. No. 92-238, at 19 (1971)); *see also Patterson*, 491 U.S. at 201-12 (Brennan, J., concurring and dissenting in part) (citing and discussing legislative history indicating that Congress intended to maintain section 1981 and Title VII as "separate, distinct, and independent"); *Randolph*, 368 F.3d at 732. Nor is it our role to attempt to harmonize these statutes or seek to channel particular causes of action toward one or the other statute. Congress has unmistakably provided for two separate regimes to redress, in many instances, identical discriminatory practices in the

employment context. The resolution of any inefficiencies resulting from the existence of two parallel (but quite different) statutory regimes that cover similar harms, but contain differing procedural requirements, limitations periods, and remedies, resides with Congress, not us.

4. We Overturn *Hart* to the Extent that it Conflicts with *Sullivan* and *Jackson*

We must now briefly return to *Hart*, where we held that a white employee who alleged that he suffered retaliation for supporting his co-worker's charge of discrimination could not maintain such a claim because section 1981 "encompasses only racial discrimination on account of the plaintiff 's race and does not include a prohibition against retaliation for opposing racial discrimination." *Hart*, 426 F.3d at 866. In so holding, we relied solely on the Eleventh Circuit's decision in *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956 (11th Cir. 1997), which held that a white employee who opposed a co-worker's racially derogatory remark could not bring a section 1981 retaliation claim because he did not contend that the employer "discriminated against him because he was white" (i.e., did not claim direct discrimination). *Id.* at 961. The *Little* decision, however, cited no authority for this proposition, nor did it provide reasoning for this declaration.[10] *Id.* We likely placed too much reliance on *Little*, given that its holding runs squarely against

---

[10] In addition, the Eleventh Circuit subsequently hinted that *Little* may conflict with its decision in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), which held that a class of employees could proceed on a section 1981 retaliation claim based on allegations that they were fired for refusing to participate in an employer's discrimination against non-white customers. *See Andrews*, 140 F.3d at 1412 n.14.

the Supreme Court's *Sullivan* decision, as well as the Court's subsequent decision in *Jackson*, which further solidified *Sullivan*'s holding. *See Sullivan*, 396 U.S. at 237; *Jackson*, 544 U.S. at 173-74; *see also Warth v. Seldin*, 422 U.S. 490, 514 n.22, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (citing *Sullivan* for the proposition that sections 1981 and 1982 are examples of "exceptions" that allow parties "to raise putative rights of third parties," including such situations where a party is "punished" for entering into a contractual relationship with an individual protected under the statute). *Jackson*, which was issued after *Little*, but while the *Hart* appeal was pending, made clear that *Sullivan* prohibits "retaliation against those who advocate the rights of groups protected" by section 1 of the Civil Rights Act of 1866. *Jackson*, 544 U.S. at 176. Thus, *Sullivan* stands for the proposition that a "white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" *Id.* at 176 n.1. Aside from conflicting with *Sullivan* and *Jackson*, the *Little* decision is plainly the minority view among the circuits: the great weight of authority is that individuals who suffer retaliation for opposing the racial discrimination suffered by others have standing to assert retaliation claims under section 1981.[11]

---

[11] *See, e.g., Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (holding that corporation had standing to bring section 1981 claim and that "to invoke § 1981 or § 1982 one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (white plaintiff could bring section 1981 claim based upon allegation that his employer "'forced' him into retirement solely because he had sold his house to a black person"); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903, 906-07 (3d Cir. 1980) (summary judgment inappropriate where material

As a result, it is clear that our decision in *Hart* cannot survive scrutiny under *Sullivan*, as expanded by the Court in *Jackson*. Moreover, our decision is out-of-step with the outcomes reached in the vast majority of cases outside of our circuit. Accordingly, we overrule our holding in *Hart* on this

---

issues of fact remained regarding section 1981 claim brought by plaintiff who claimed he was discharged for supporting rights of African-American co-workers); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 (4th Cir. 1980) (white student protected under section 1981 from retaliation by school because of her association with a black schoolmate); *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1229 (5th Cir. Unit B 1982) (retaliatory discharge claim allowed under section 1981 where evidence showed plaintiff was discharged for lawful advocacy of minority and union rights); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (holding that it was clear under "well-settled" law that a plaintiff "need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement of his claims[,]" but rather plaintiff's advocacy on behalf of minorities was sufficient to allege retaliation under section 1981); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (white plaintiff had standing under section 1981 for claim that employer fired him because he objected to discriminatory discharge of an African-American co-worker); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white employee fired for helping African-American co-worker file an EEOC claim could state a claim under section 1981); *see also Malhotra*, 885 F.2d at 1316 (Cudahy, J., concurring) (noting that "a white person who is discharged for espousing the rights of minorities could establish that the employer acted with discriminatory intent (as required to state a claim under section 1981); that the racial discrimination was directed at another, rather than directly at the plaintiff, is irrelevant, since it is the plaintiff who is suffering due to the employer's racial discrimination" and citing *Sullivan* and cases from other circuits in support).

limited issue.[12] We now hold that a plaintiff may maintain a cause of action under section 1981, where the plaintiff has suffered retaliation for advocating the rights of those protected under section 1981. *See Jackson*, 544 U.S. at 179-80.

C. Humphries Presented a Claim of Retaliation Sufficient to Survive Summary Judgment

Turning to the merits of Humphries's retaliation claim under section 1981, we generally have applied the same prima facie requirements to discrimination claims brought under Title VII and section 1981. *See, e.g., Alexander v. Wis. Dep't of Health & Family Servs.*, 263 F.3d 673, 682 (7th Cir. 2001) (applying same standard to Title VII and section 1981 discrimination claims); *Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 940 (7th Cir. 1996) ("Although section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical."); *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 568 (7th Cir. 1989) ("It is well settled that the methods and order of proof applicable to a claim of disparate treatment under Title VII are equally availing under § 1981."); *see also Patterson*, 491 U.S. at 186 (applying *McDonnell Douglas* framework to section 1981 claims). We see no reason to apply different requirements between the statutes with regard to retaliation claims. *See Foley*, 355 F.3d at 340 n.8 (approving of the same standard applied to retaliation claims under Title VII and

---

[12] Because this opinion overrules a prior case, it has been circulated in advance of publication to all judges of this court in regular active service pursuant to Seventh Circuit Rule 40(e). A majority did not favor a rehearing en banc on the question of overruling *Hart*, 426 F.3d 863.

section 1981); *see also Hasan v. DOL*, 400 F.3d 1001, 1003-04 (7th Cir. 2005) (applying Title VII prima facie requirements to retaliation cases brought under the Energy Reorganization Act); *Larimer v. I.B.M. Corp.*, 370 F.3d 698, 702 (7th Cir. 2004) (applying Title VII prima facie requirements to retaliation claim under ERISA).

To overcome Cracker Barrel's motion for summary judgment, Humphries may proceed under either the direct or indirect methods. *See Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003) (citing *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002)). Under the direct method, Humphries must present direct evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. *Id.*; *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006). Under the indirect method, he must show that after opposing the employer's discriminatory practice only he, and not any similarly situated employee who did not complain of discrimination, was subjected to a materially adverse action even though he was performing his job in a satisfactory manner. *See Sylvester v. SOS Children's Villages Ill., Inc.*, 453 F.3d 900, 902 (7th Cir. 2006); *White*, 126 S. Ct. at 2415. Thus, the indirect "method of establishing a prima facie case requires proof both of similarly situated employees and of the plaintiff's performing his job satisfactorily." *Sylvester*, 453 F.3d at 902.

Under the district court's view (which, naturally, Cracker Barrel echoes on appeal), Humphries's prima facie case failed because, among other reasons, he did not present sufficient evidence to meet the similarly situated requirement under the

indirect method.[13] According to Cracker Barrel, similarly situated comparators *must* have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, and, under Cracker Barrel's view, Humphries's two comparators, Stinnett and Dowd, fail that test.

Cracker Barrel's view of our similarly situated requirement is too rigid and inflexible. This requirement "should not be applied mechanically or inflexibly." *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 952 (7th Cir. 2006). True, we have sometimes stated the similarly situated requirement in the "must" terms that Cracker Barrel argues, but a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement "*normally* entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Radue v. Kimberly-Clark Corp.* 219 F.3d 612, 617-18 (7th Cir. 2000) (emphasis added); *see also Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 644 (7th Cir. 2006); *Ezell v. Potter*, 400 F.3d 1041, 1049-50 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004); *Lucas v. Chi. Transit Auth.*, 367 F.3d 714, 733 (7th Cir. 2004); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 580 (7th Cir. 2003); *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 546 (7th Cir. 2002); *Snipes v. Ill. Dep't of Corr.*,

---

[13] We need not decide whether Humphries has enough evidence under the direct method because he meets the requirements of the indirect method.

291 F.3d 460, 463 (7th Cir. 2002); *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002). In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." *Radue*, 219 F.3d at 617. "As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity." *Id.* at 618; *see also Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006); *Ezell*, 400 F.3d at 1050.

In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated." *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (discussing the similarly situated requirement in the equal protection context). Instead, courts should apply a "common-sense" factual inquiry -- essentially, are there enough common features between the individuals to allow a meaningful comparison? *Id.* (citing *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382-83 (7th Cir. 2000) and *Radue*, 219 F.3d at 619). Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. *See Hull*, 445 F.3d at 951-52.

It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees -- distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. *See, e.g., Ezell*, 400 F.3d at 1050. Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as

well as to the extent to which the plaintiff cherry-picks would-be comparators, *see Crawford v. Ind. Harbor Belt R.R. Co.*, 461 F.3d 844, 845-46 (7th Cir. 2006), but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation -- recall that the plaintiff need not *prove* anything at this stage.

Establishing a prima facie case should not be such an onerous requirement: "the plaintiff 's evidence on the prima facie case need not be overwhelming or even destined to prevail; rather, the plaintiff need present only 'some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion.'" *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir. 2000) (quoting *Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir. 1997) (also noting that the prima facie burdens "should not be applied rigidly")); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). "The prima facie case, and specifically its fourth prong, are meant to identify situations where the 'actions taken by the employer, . . . if unexplained, are more likely than not based on consideration of impermissible factors.'" *Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) (quoting *Allen v. Diebold, Inc.*, 33 F.3d 674, 675 (6th Cir. 1994)). But the method of inquiry established by *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567,

577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). After all, our intention in establishing the similarly situated requirement was to provide plaintiffs the "boost" that the *McDonnell Douglas* framework intended. *See Stone*, 281 F.3d at 643.

With this legal and policy backdrop in mind, we now turn to the would-be comparators in this case. It is clear that Stinnett was a sufficient comparator. He held the same associate manager position as Humphries, with the same duties, including responsibility for ensuring the safe was locked at all times. He shared the same supervisor (Dowd) and same ultimate decisionmaker (Christensen). Like Humphries, Stinnett had received past negative performance evaluations, including low ratings on "asset protection" categories. In addition, Humphries presented competent testimony (both his own and that of a co-worker) that Stinnett – like Humphries – had used a so-called Gold Card to pay for a meal that a customer had complained about, apparently in contravention of Cracker Barrel policy. In addition, Humphries presented evidence that Stinnett's termination of Green (the immediate precursor event connected to Humphries's termination) was impermissible (under Cracker Barrel policy, only general managers, not associate managers, can fire employees). If anything, the record tends to suggest that Humphries generally performed slightly better than Stinnett. In addition, Humphries presented evidence that Stinnett also left the safe unlocked. Specifically, Humphries testified that Stinnett (and Dowd) routinely left the safe unlocked -- the very basis for which Humphries was fired, and one which Humphries hotly disputes.

Cracker Barrel seeks to distinguish Stinnett on the grounds that he left the safe unlocked during the *daytime* (i.e., business hours) whereas Humphries left it unlocked during the *nighttime* (i.e., overnight). This is a distinction without much

difference. Although arguments can be made as to relative greater potential harm of leaving the safe unlocked at night, the issue remains that it was contrary to Cracker Barrel policy to leave the safe unlocked and unattended at any point during the 24-hour day. More importantly, Cracker Barrel's argument here reflects precisely the type of formalistic argument that should not carry the day at summary judgment. Humphries was not required to show an identity of wrongful conduct: "the law is not this narrow." *Ezell*, 400 F.3d at 1050. It was enough to show "similar -- not identical -- conduct" and this surely qualifies under that standard. *Id.* To find otherwise is to lose sight of the big-picture, common-sense perspective. Thus, in terms of job titles, work duties, supervisor, and work performance histories, Stinnett and Humphries have more than sufficient similarity. A single comparator will do; numerosity is not required.[14] *See, e.g.*, *Goodwin*, 442 F.3d at 619; *Ezell*, 400 F.3d at 1050.

Cracker Barrel also contends that it established that it had a legitimate reason for firing Humphries, and that Humphries failed to show that the reason that Cracker Barrel provided for his discharge was pretext (i.e., a lie). *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 417-19 (7th Cir. 2006) (discussing general requirements to establish pretext). On these issues, we agree with the district court's determination that the record is replete with contested material facts pertaining to Humphries's work performance and the nature of Christensen's beliefs when he terminated Humphries. As an initial matter, Humphries contends that he did not leave the safe unattended, and the evidence implicating him is comprised solely of the testimony from Stinnett – the very

---

[14] Because we conclude the Stinnett was an adequate comparator, we need not address whether Dowd fits the requisite criteria.

individual Humphries targeted in his final complaint of discrimination. And there is testimony in the record that a co-worker observed Stinnett and Dowd acting differently (less deferentially) toward Humphries just prior to his firing, and that this co-worker specifically warned Humphries about Stinnett and Dowd because she believed that their behavior indicated that they were "up to something to harm Humphries." In addition, prior to firing Humphries, it appears that Christensen conducted no investigation into the veracity of Stinnett's claim. He did not interview Humphries; he simply credited Stinnett's story. Finally, the timing of Humphries's firing is suspicious: he was fired one week after he complained to Christensen about discriminatory practices and one day prior to a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of Humphries's complaints. Finally, there was evidence in the record tending to show that similar transgressions were not sufficient to fire other similarly situated employees who did not complain of discrimination. *See generally Curry v. Menard, Inc.*, 270 F.3d 473, 479 (7th Cir. 2001) (holding that a showing that similarly situated employees were treated differently may be enough to establish pretext).

This is not to say that merely pointing to an employer's shoddy investigatory efforts is sufficient to establish pretext. Erroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons. *See Forrester*, 453 F.3d at 419; *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1012-13 (7th Cir. 2004). But, under the circumstances here, there was sufficient other circumstantial evidence in the record to support a reasonable inference that Humphries was "set-up" by Stinnett (in tandem with Dowd and Christensen), *see Sylvester*, 453 F.3d at 905, and that his purported bad act of leaving the safe unlocked was a fabrication to justify his

firing. In this sense, the quality of Christensen's investigation may have some bearing on the truthfulness of Cracker Barrel's proferred reasons for terminating Humphries. In short, these are the sort of disputed factual issues that a jury should sort out.

As a final note, on remand, Humphries will have only his claim of retaliation. We agree with the district court's determination that he waived (forfeited would be the better term) his discrimination claim by devoting only a skeletal argument in response to Cracker Barrel's motion for summary judgment. Although Humphries did attempt to incorporate his well-developed arguments pertaining to the retaliation claim, and there is substantial over-lap with regard to the prima facie requirements between the two claims, he did nothing more. On appeal, however, Humphries addresses for the first time the issue of his replacement, and Cracker Barrel outlines a series of arguments as to why Humphries's reprimands and warnings do not constitute materially adverse employment actions. None of these arguments were reached by the district court nor flushed out in the briefing -- this is precisely why we insist on parties raising all pertinent arguments below. Given that Humphries's core claim is one for retaliation, there is little inequity in applying our typical forfeiture rule to this particular claim.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we **AFFIRM** the grant of summary judgment in favor of the defendant on Humphries's discrimination claim, and we **REMAND** for further proceedings in accordance with this opinion.

DISSENT: EASTERBROOK, *Chief Judge*, dissenting in part. The Supreme Court held in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), that Title IX of the Education Amendments of 1972 -- which forbids educational programs that receive federal funds from discriminating on account of sex, 20 U.S.C. § 1681(a) -- allows the judiciary to define the word "discriminate." The Court used that authority to curtail steps that make reports of discrimination costly to students and employees. Today this court attributes to *Jackson* the conclusion that *all* federal statutes dealing with the employment relation prohibit retaliation.

The Justices gave three principal reasons for their decision in *Jackson*. (1) The word "discrimination" has sufficient ambiguity to permit a reading that includes an anti-retaliation norm. 544 U.S. at 173-74. (2) Title IX was enacted in 1972, after anti-retaliation norms became common, making it sensible to resolve the ambiguity in favor of this reading. 544 U.S. at 176. (3) Lack of an anti-retaliation norm would make it too easy for educational programs to undermine the principal substantive rules in Title IX by getting rid of anyone who tried to enforce them. 544 U.S. at 180-81.

None of these reasons applies to 42 U.S.C. § 1981, the subject of today's decision. (1) The word "discriminate" does not appear in § 1981. What that statute provides is that all citizens have the same right to make and enforce contracts. How can a decision that resolves ambiguity in the word "discriminate" apply to other statutes with different language? (2) Section 1981 was enacted in 1866, long before anti-retaliation norms were created. The first mention of "retaliatory discharge" in any federal appellate opinion came in *NLRB v. Arthur Winer, Inc.*, 194 F.2d 370 (7th Cir. 1952), and the first use by the Supreme Court was *NLRB v.*

Scrivener, 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). (3) Lack of an anti-retaliation norm in § 1981 would not hinder enforcement of civil rights laws, because there is a *real* anti-retaliation rule in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-3(a). That's one reason why *Jackson* distinguished Title IX of the 1972 Act from Title VII of the 1964 Act. 544 U.S. at 175. *Cf. Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (holding that there is no general anti-retaliation doctrine under 42 U.S.C. § 1983).

The question at issue today is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed to file a timely charge under Title VII and engage in conciliation before turning to court. By adding an anti-retaliation rule to § 1981, the majority does not craft an ancillary doctrine necessary to make the principal norm work (as the Court did in *Jackson*); instead it demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court.

This is not the first time that a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII. The Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), that § 1981 should be construed when possible to avoid conflict with Title VII. Today, however, the majority does exactly what *Patterson* forbids. It reads § 1981 to have the same substantive content as Title VII, but without features such as short periods of limitations that employees find inconvenient. That's not a sound way to treat this statute, already extended far beyond its original meaning. *See Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415

(1976); Charles Fairman, VI *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88 (Part One)* 1207-60 (1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. *Patterson* holds that the process of judicial extension must stop.

Congress can add to a law's reach, and in 1991 it did so -- but the 1991 revision does not mention "retaliation" or change the text of § 1981(a), on which Humphries's claim rests. When § 1981 and Title VII have different but overlapping provisions (as they do, for example, with respect to damages), then the judiciary must enforce both. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 141-44, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001); *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). But the fact that overlapping systems may coexist does not justify *creating* incompatibility, as the majority does today. Section 1981 does not contain an anti-retaliation rule. When deciding whether to add such a rule to § 1981, we must consider the effect that this step would have on Title VII. That's the holding of *Patterson*.

To the extent that my colleagues treat the 1991 legislation as discarding *all* of *Patterson*, they follow an approach that was rejected in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), and *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Legislation does not "overrule" decisions of the Supreme Court; new statutes adopt new rules but leave in place existing norms that the legislation does not touch. Nothing in the Civil Rights Act of 1991 justifies reading § 1981 more broadly than its (amended) text or undermining parts of Title VII that remain in force.

The Court demonstrated this in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006), which unanimously reversed a decision that had invoked the judges' views of wise public policy to extend § 1981. *Domino's Pizza* shows that *Patterson* cannot be treated as defunct. The Supreme Court has cited *Patterson* favorably in 24 decisions since *Landgraf* and *Rivers*. Of these, *Domino's Pizza* is the most salient because it uses *Patterson*'s interpretive methodology to construe § 1981 as amended by the Civil Rights Act of 1991.

My colleagues end up declaring that the text of § 1981, its context, its history (the absence of anything like an anti-retaliation norm in 1866), its function, and the effect of an inventive reading on the operation of Title VII all are irrelevant. The rule they impute to *Jackson* has no moorings in any statute's text or provenance. Yet that's not at all what *Jackson* says; it dealt with the actual language and operation of Title IX and does not justify a language-and-history-free interpretation of all federal statutes. I do not think it likely that the Supreme Court, which insists that statutory language be followed even if inconvenient or jarring -- *see, e.g.*, *Arlington Central School District v. Murphy*, 126 S. Ct. 2455, 2463, 165 L. Ed. 2d 526 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2625-27, 162 L. Ed. 2d 502 (2005); *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005); *Tyler v. Cain*, 533 U.S. 656, 663 n.5, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) -- would accept such an atextual approach. I appreciate the temptation to make every law "the best it can be," but that is not the Supreme Court's current mode of statutory interpretation, as *Domino's Pizza* shows for § 1981 in particular.

Perhaps it *was* the approach that prevailed in 1969, when the Court decided *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). The majority in *Sullivan* held that a plaintiff in litigation under 42 U.S.C. § 1982 has standing to complain about retaliation, and *Jackson* concluded that it must have had a substantive component too. So read, *Sullivan* is of a piece with other decisions holding that judges may supplement statutes to make them "more effective." *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). But *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), abandoned that approach, and since the 1970s the Court has lashed interpretation more closely to statutory text. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (emphasis in original).

It is anachronistic to say that, because *Sullivan* engaged in a freewheeling "interpretation" of § 1982, we may today take liberties with § 1981. One might as well cite *Borak* for the proposition that "every right implies a remedy" so that courts should today create a private right of action for every statute other than those that the Supreme Court addressed in *Cort* and its successors.

Yet that is the majority's tack. The argument goes that, because *Sullivan* ignored the language of § 1982 and drafted an "improved" version of the statute, we are free to do the same today for § 1981, its neighbor. The Supreme Court requires us to proceed otherwise. *Borak* dealt with § 14(a) of

the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). It was as freewheeling in "interpreting" that law as *Sullivan* was with § 1982. Yet the Court has held that the change of interpretive method announced in *Cort* applies to all other sections of the Securities Exchange Act. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977) (§ 14(e)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) (§ 17(a)). *Borak* and similar decisions from the 1960s have not been overruled, but we have been told in no uncertain terms that they must not be extended. Indeed, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), the Court declined to apply *Borak* to a portion of § 14(a) that had not been involved in *Borak*. So that case has been limited to a single sentence of one subsection. Why, then, may the method of *Sullivan* be applied to other sections of the Civil Rights Act of 1866 despite intervening precedent?

There has been a sea change in interpretive method between *Sullivan* and today -- and *Patterson* not only exemplifies the change but also applies it to § 1981. In 1989 the Justices were invited to rely on *Sullivan* as a model for the interpretation of § 1981. They declined. Less than a year ago, in *Domino's Pizza*, the Court reiterated Patterson's interpretive stance. *Sullivan*, by contrast, did not receive a mention. Yet my colleagues do not mention *Domino's Pizza*. Why bypass the Supreme Court's 2005 understanding of § 1981 in favor of a 1969 understanding of § 1982? We must respect our superiors' decision to call a halt to judicial extrapolation; *Domino's Pizza* rather than *Sullivan* exemplifies the appropriate judicial role. By relying on *Sullivan*, my colleagues indulge an assumption -- that if some remedies are good, then more must be better -- that has no support on today's Supreme Court.

Now if § 1981 had been enacted while the freewheeling approach of *Sullivan* was in force, it might well be appropriate to adopt a goal-driven reading. To use the interpretive tools of the last 30 years to unravel a statute passed in earlier days would be to cross up the legislature. That was a point the Court made in *Jackson*: Title IX was enacted in 1972, and Congress may well have anticipated that *Sullivan*-like construction would follow. 544 U.S. at 176. The legislators who voted for § 1981 in 1866 would not have anticipated any such judicial liberties, however; and when § 1981 was amended in 1991, decisions such as *Cort* and *Rodriguez* and *Patterson* had announced a textual approach. So when a question arises in 2006 about the meaning of this 1866/1991 legislation, our job is to apply the interpretive norms that prevailed in 1866, 1991, and today, not to take an ambiguous decision from 1969 and see how far we can run with it.

Section 1981 does offer one opening for a claim in the nature of retaliatory discharge. Suppose Cracker Barrel regularly fired black employees who protest discrimination in the workplace, but not protesting white employees. Then it might be appropriate to conclude that black persons do not enjoy the same right as white persons to contract with Cracker Barrel. But Humphries does not make such an argument. For all this record shows, Cracker Barrel fires every complainer, without regard to the subject of the complaint. An employer that treats everyone the same in this respect complies with § 1981, so the judgment should be affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 03-C-3765

[Filed October 6, 2005]

HEDRICK G. HUMPHRIES,	)
Plaintiff,	)
	)
vs.	)
	)
CBOCS WEST, INC.,	)
Defendant.	)
	)

MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This matter comes before the court on the motion of Defendant CBOCS West, Inc. ("Cracker Barrel"), for summary judgment and the motion of Plaintiff Hedrick Humphries to strike the declaration of Kimberly Tramel. For the reasons set forth below, the motion for summary judgment is granted and the motion to strike is denied as moot.

BACKGROUND

Humphries is a former employee of Cracker Barrel at its restaurant and retail store in Bradley, Illinois. He is African-American. During the three years that Humphries worked for Cracker Barrel, he was never demoted, nor was his pay ever reduced. He was promoted at least once. Over the last eight months of his employment, Humphries received nine written or verbal warnings with respect to his work performance that were memorialized in written Employee Counseling Reports, or "ECRs." Twice these ECRs informed Humphries that potential disciplinary action included termination. The three penultimate ECRs, issued in early September 2001, stated that they were a "final" warning.

In late November 2001, Humphries informed William Christensen, the district manager for the Bradley restaurant and store, that he felt he and another African-American employee named Venis Green were being treated in a discriminatory manner because of their race.

On the morning of December 3, Joe Stinnett, another associate manager, reported finding the store safe unlocked and slightly open. Cracker Barrel policy requires that an associate manager who closes a store in the evening is responsible for making sure that the store safe is closed and locked before leaving for the night. Humphries was the associate manager on duty the night of December 2. His employment was terminated on December 5. According to Cracker Barrel, this termination occurred because Humphries was on duty the night before the safe was found open; according to Humphries, the termination was the result of Cracker Barrel's desire to retaliate against him for his November comments to Christensen.

Our prior opinions detailed the procedural morass that ensued after Humphries' termination. It is sufficient to note that, as the case now stands, the only cause of action asserted is founded in 42 U.S.C. § 1981. According to Humphries, Cracker Barrel interfered with his rights to make and enforce contracts to the same extent enjoyed by white citizens. Cracker Barrel moves for summary judgment in its favor on his claims.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden then shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial. *Id.* The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence. *Id.* The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2510 (1986).

DISCUSSION

Though Humphries originally sued under both Title VII and 42 U.S.C. § 1981, we dismissed the Title VII claims on November 1, 2004. Thus, the motion and this opinion focus solely on Humphries' § 1981 claim.[1]

To avoid summary judgment of a § 1981 claim arising from an employment relationship, an employee must show that he or she undertook the statutorily protected action of making or enforcing a contract, an action by the employer that worked to the detriment of the employee, and a causal connection flowing from the former to the latter. *See Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 301 (7th Cir. 2004). The third element can be established either directly or indirectly. *See Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 783 (7th Cir. 2004). The direct method allows a trier of fact to find discriminatory conduct without inference or presumption. *See id.* The evidence necessary to allow a plaintiff to employ the direct method can consist of either an employer's admission that the challenged action was the product of unlawful discrimination or a

---

[1] The parties do not address the issue of whether § 1981 applies to termination of an at-will employment relationship. *In Gonzalez v. Ingersoll Mill. Mach. Co.*, the Seventh Circuit opined in dicta that it does not. 133 F.3d 1025, 1035 (7th Cir. 1998). Although the court has not since passed on the question definitively, the text of § 1981, which specifically refers to termination as being within its scope, and at least one subsequent opinion make the continued vitality of Gonzalez on this point questionable. *See Walker v. Abbott Laboratories*, 340 F.3d 471, 477-78 (7th Cir. 2003). However, since Cracker Barrel has not pressed this point, we will proceed using the assumption that § 1981 can apply to the situation in this case.

combination of events that directly indicates that discrimination was afoot. *See id.* Humphries contends that he can proceed under this method under the second route. He asserts that the combination of the short period of time that elapsed between the time that he complained about Cracker Barrel's treatment of Green and him and Cracker Barrel's inaction with respect to his complaints thereafter directly establish a discriminatory motive. Despite Humphries' arguments, this is far from the "convincing mosaic" necessary to point directly to unlawful motivations behind Cracker Barrel's action. *Troupe v. May Dep't. Stores*, 20 F.3d 734, 737 (7th Cir. 1994). At best, this evidence describes a few actions concentrated at the time of termination, not the abrupt about-face or pervasive pattern held sufficient in other cases. *See Lang v. Ill. Dep't of Child and Family Servs.*, 361 F.3d 416, 419-21 (7th Cir. 2003); *Sitar v. Indiana Dep't of Transportation*, 344 F.3d 720, 728-29 (7th Cir. 2003).

The second manner by which discrimination can be shown, the indirect method, consists of a three-step process. *See Gonzalez v. Ingersoll Mill. Mach. Co.*, 133 F.3d 1025, 1032 (7th Cir. 1998). First, the plaintiff must demonstrate a prima facie case for discrimination. *Id.* To make out his prima facie case, Humphries must show that he is a member of a racial minority, that he was meeting Cracker Barrel's legitimate expectations with respect to his job duties, that he suffered an adverse action, and that similarly situated white employees were treated more favorably than he. *See id.* at 1032, 1035. If Humphries can demonstrate each of these elements, a presumption of unlawful discrimination arises, which Cracker Barrel must counter with a lawful reason for Humphries' termination. *Id.* at 1032. If Cracker Barrel does so, Humphries must then show that the proffered reason is actually a pretext for discrimination. *Id.*

Cracker Barrel challenges Humphries' showing on the second and fourth elements of his prima facie case. With respect to the second, whether Humphries was performing satisfactorily, the parties' arguments clearly indicate that material issues of fact exist. The fourth, however, clearly falls in Cracker Barrel's favor.

Humphries contends that Ken Dowd and Joseph Stinnett, who are both white and who held supervisory positions, provide the necessary points of comparison. According to Humphries, both of these employees were cited for not meeting Cracker Barrel's standards with respect to safeguarding money and other assets of the company. To be similarly situated, two employees must have the same supervisor, engage in the same conduct, have the same qualifications, and have no legitimately differentiating characteristics that would account for an employer's differing treatment. *See Ineichen v. Ameritech*, 410 F.3d 956, 960-61 (7th Cir. 2005). Humphries contends that Dowd and Stinnett engaged in conduct similar to that for which he was terminated, but they kept their jobs. However, he provides no other information about them that would be germane to the inquiry. In other words, he provides evidence that Dowd and Stinnett are comparable to him in one material respect, but by no means in all material respects. *See Sartor v. Spherion Corp.*, 388 F.3d 275, 279 (7th Cir. 2004). The latter is required to stave off summary judgment. Because Humphries has not offered any employees whom we can determine to be truly similar to him, we have no way to gauge whether Cracker Barrel behaved in a racially discriminatory manner. Because Humphries has not shown each element of his prima facie case, he cannot prevail through the indirect method.

Even if Humphries had offered a similarly situated employee, Cracker Barrel would still be entitled to summary

judgment. Viewing the situation from Cracker Barrel's perspective at the time Humphries was fired, there is nothing suspicious about their belief that a violation of their employment policy occurred when the safe was not closed and locked when the store opened on December 3, 2001. *See Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000). Because Humphries was the manager on duty the night before, it was his responsibility to make sure that the safe was closed and locked. There is nothing unlawful about an employer terminating an employee who fails to safeguard money and other valuables belonging to the employer.

Humphries counters that this reason is a lie; he supports his belief by stating that the safe was locked and closed when he left on the night of December 2. Even if we assume this is true, it does nothing more than show that Cracker Barrel's belief that Humphries had neglected to perform an important duty was incorrect, not that they did not truly hold the belief. That may show that Cracker Barrel made a mistake, but it is not pretext that would allow Humphries to overcome the legitimate business reason Cracker Barrel has proffered for terminating his employment. *See id.* Consequently, Cracker Barrel is entitled to summary judgment on Humphries' retaliation claim.

B. Racial Discrimination

Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the presentation he makes in his opposition papers that only the retaliation claim has any vitality. This is especially true given that his response to Cracker Barrel's claimed entitlement to summary judgment on the discrimination claim consists of a single paragraph that in essence contends that his arguments

with respect to the retaliation claim apply directly to his discrimination claim and defeat Cracker Barrel's motion.

This presentation does not carry the day for two reasons. First, undeveloped arguments result in waiver of the positions that otherwise might be permissible. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). Second, as described above, Humphries' retaliation claim fails as a matter of law. If the same arguments are to apply to his discrimination claim, then it must meet a like fate.

C. Motion to Strike Declaration of Kimberly Tramel

In connection with his response to the motion for summary judgment, Humphries moved to strike the declaration of Kimberly Tramel, who identifies herself only as an employee of Cracker Barrel. Because the assertions contained within the declaration played no part in our decision and in light of the outcome of the motion for summary judgment, the motion to strike is denied as moot.

CONCLUSION

Based on the foregoing, Cracker Barrel's motion for summary judgment is granted. Humphries' motion to strike the declaration of Kimberly Tramel is denied as moot.

Charles P. Kocoras
Chief Judge
United States District Court
Dated: October 6, 2005

(2)

No. 06-1431

Supreme Court, U.S.
FILED
JUL 18 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CYNTHIA H. HYNDMAN
Counsel of Record
ANGEL M. KRULL
ALEEZA M. STRUBEL
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 663-3100 (Phone)
(312) 663-0303 (Fax)

Counsel for Respondent Hedrick G. Humphries

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

A. The Circuit Courts Agree That Retaliation Claims Are Cognizable Under Section 1981 5

B. The Issue Is Already Settled By Supreme Court Precedent 8

C. The Seventh Circuit's Interpretation Of Section 1981 Is Uncontroversial And Appropriate 13

D. Cracker Barrel's Policy Argument Regarding Overlap Between Section 1981 And Title VII Is Irrelevant, Wrong, And Not A Reason To Grant The Writ 16

E. This Case Is An Inappropriate Vehicle For Deciding Whether Retaliation Claims Are Cognizable Under Section 1981 Because Cracker Barrel Forfeited The Issue By Failing To Raise It Before The District Court 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Aleman v. Chugach Support Serv.,
485 F.3d 206 (4th Cir. 2007) 5, 8, 18

Andrews v. Lakeshore Rehab. Hosp.,
140 F.3d 1405 (11th Cir. 1998) 6, 7

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 20

Choudhury v. Polytechnic Inst. of N.Y.,
735 F.2d 38 (2d Cir. 1984) 4, 19

Day v. Wayne County Bd. of Auditors,
749 F.2d 1199 (6th Cir. 1984) 7, 8

Eldred v. Ashcroft,
537 U.S. 186 (2003) 15

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 20

Foley v. Univ. of Houston Sys.,
355 F.3d 333 (5th Cir. 2003) 5

Gaddis v. Redford Twp.,
364 F.3d 763 (6th Cir. 2004) 8

Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania,
458 U.S. 375 (1982) 3, 9

Goff v. Cont'l Oil Co.,
678 F.2d 593 (5th Cir. 1982) 19

Hart v. Transit Mgmt. of Racine, Inc.,
426 F.3d 863 (7th Cir. 2005) 6, 7

Hawkins v. 1115 Legal Serv. Care,
163 F.3d 684 (2d Cir. 1998) 6

TABLE OF AUTHORITIES – Continued

Page

Humphries v. CBOCS West, Inc.,
474 F.3d 387 (7th Cir. 2007) ..... *passim*

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) ..... *passim*

Johnson v. Ry. Express Agency, Inc.,
421 U.S. 454 (1975) 17

Johnson v. Univ. of Cincinnati,
215 F.3d 561 (6th Cir. 2000) 7

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 9, 10, 12

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004) 3, 12, 14

Kim v. Nash Finch Co.,
123 F.3d 1046 (8th Cir. 1997) 6

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 4, 15

Ledbetter v. Goodyear Tire & Rubber Co.,
127 S. Ct. 2162 (2007) 16

Little v. United Techs.,
103 F.3d 956 (11th Cir. 1997) 6, 7

Manatt v. Bank of Am., N.A.,
339 F.3d 792 (9th Cir. 2003) 5

O'Neal v. Ferguson Constr. Co.,
237 F.3d 1248 (10th Cir. 2001) 6

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) ..... *passim*

Rivers v. Ry. Express, Inc.,
511 U.S. 298 (1994) 12, 15, 18

TABLE OF AUTHORITIES – Continued

Pag

Runyon v. McCrary,
427 U.S. 160 (1976) 3, 9, 14, 17

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) ..... *passim*

Tillman v. Wheaton-Haven Recreation Ass'n,
410 U.S. 431 (1973) 3, 9

Zedner v. United States,
126 S. Ct. 1976 (2006) 15

STATUTES AND OTHER MATERIALS

20 U.S.C. § 1681(a) 10

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1982 ..... *passim*

42 U.S.C. § 2000e 2, 18

42 U.S.C. § 2000e-2(a) 18

43 U.S.C. § 1626(g) 18

Civil Rights Act of 1866, 14 Stat. 27 ..... *passim*

Civil Rights Act of 1991, Pub. L. No. 102-166, 105
Stat. 1071 ..... *passim*

H.R. REP. NO. 102-40 (1991) 15, 16

S. REP. NO. 101-315 (1990) 18

Supreme Court Rule 10 8

RESPONDENT'S BRIEF IN OPPOSITION

In asking the Court to grant review of the issue whether retaliation claims are cognizable under 42 U.S.C. § 1981, Petitioner CBOCS West, Inc. ("Cracker Barrel") repeatedly states that the issue suffers from jurisprudential "vacillation and uncertainty." Such "vacillation and uncertainty," however, exists only in Cracker Barrel's imagination. All eight circuits to consider the question have unanimously recognized retaliation claims under section 1981. Moreover, this Court held only two years ago in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), that retaliation is a form of discrimination, and in doing so reaffirmed the holding in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that retaliation claims are cognizable under 42 U.S.C. § 1982, the companion statute to section 1981. There is no confusion, no vacillation, and no uncertainty. There is simply no reason for the Court to grant Cracker Barrel's petition for a writ of certiorari.

STATEMENT OF THE CASE

Respondent Hedrick Humphries, an African-American, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Pet. App. 3a. He complained to his supervisors about race discrimination, and Cracker Barrel fired him shortly thereafter. Pet. App. 4a-5a. Mr. Humphries timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which conducted an investigation and issued Mr. Humphries a right-to-sue letter. Within ninety days of receiving the letter, Mr. Humphries timely filed a *pro se* complaint against Cracker Barrel, alleging race discrimination and

retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981.

At the same time he filed his *pro se* complaint, Mr. Humphries filed an application to proceed *in forma pauperis* ("IFP"). The district court denied the application partly because Mr. Humphries did not provide the court enough information about his expenses. Although Mr. Humphries filed two amended IFP applications to clarify those issues, the district court denied both amended applications and ordered Mr. Humphries to pay the filing fee, which he did on January 12, 2004.

Cracker Barrel then moved to dismiss the Title VII claims on the ground that Mr. Humphries did not pay his filing fee within ninety days after receiving his right-to-sue letter. By this time, Mr. Humphries had retained counsel, who argued that the IFP applications tolled the time to pay the filing fee and that Mr. Humphries had paid the fee when the court ordered him to do so. The district court nevertheless dismissed Mr. Humphries' Title VII claims, and the case proceeded on the section 1981 claims only. Those claims were dismissed on summary judgment in October 2005. In the district court, Cracker Barrel failed to raise any argument that retaliation claims are not cognizable under section 1981. Pet. App. 5a-6a. When Mr. Humphries appealed the dismissal of the section 1981 claims, he did not appeal the dismissal of his Title VII claims because Cracker Barrel had not previously challenged the viability of his claims under section 1981. Nonetheless, on appeal Cracker Barrel argued for the first time that retaliation claims are not cognizable under section 1981. *Id.* The Seventh Circuit rejected that argument and reversed the grant of summary judgment.

The sole issue that Cracker Barrel asks the Court to review is whether retaliation claims are cognizable under section 1981, which states as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The language in section 1981(a) was initially part of section 1 of the Civil Rights Act of 1866 ("1866 Act"), which was later broken into section 1981 and its companion statute section 1982. *See, e.g., Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372 (2004) (discussing history of section 1981); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 383-84 (1982) (same, and referring to sections 1981 and 1982 as "companion" statutes); *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (same); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973) (discussing the "historical relationship" between sections 1981 and 1982). The language in sections 1981(b) and (c)

was added in 1991 when Congress enacted the Civil Rights Act of 1991 ("1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071.

Congress passed the 1991 Act in direct response to this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 177 (1989), which narrowly interpreted the phrase "make and enforce contracts" as excluding "conduct by the employer after the contract relation has been established." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (finding that section 101 of the 1991 Act "amended the 1866 Civil Rights Act's prohibition of racial discrimination in the 'making and enforcement [of] contracts' in response to *Patterson v. McLean Credit Union*") (citations omitted). Prior to *Patterson*, there was a "general consensus" in the circuit courts that section 1981 prohibited retaliation. *Humphries v. CBOCS West, Inc.*, Pet. App. 12a; *see also Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 42-43 (2d Cir. 1984). *Patterson* changed that legal landscape, and in response Congress amended section 1981 to add the broad definition of "make and enforce contracts" that is quoted above. Congress titled this section of the 1991 Act "Prohibition Against *All* Racial Discrimination in the Making and Enforcement of Contracts." Civil Rights Act of 1991, § 101 (emphasis added).

As explained below, all circuits that have analyzed the 1991 amendment to section 1981 have interpreted it to prohibit retaliation. That unanimous conclusion is consistent with the Court's decisions in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Also supporting that result is the text of the 1991 Act, the House Committee Report for the 1991 Act, and public policy encouraging the enforcement of civil rights statutes.

Finally, the Court should deny the writ because Cracker Barrel sandbagged Mr. Humphries by first raising its section 1981 argument after it was too late to appeal the district court's Title VII ruling.

REASONS FOR DENYING THE WRIT

A. The Circuit Courts Agree That Retaliation Claims Are Cognizable Under Section 1981.

Despite Cracker Barrel's claim of widespread "vacillation and uncertainty" on this issue, there is simply no split of authority in the circuit courts regarding whether retaliation claims are cognizable under section 1981. All eight circuits to address this issue – the Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh – unanimously hold that section 1981 prohibits retaliation. *See Aleman v. Chugach Support Serv.*, 485 F.3d 206, 213-14 (4th Cir. 2007) (rejecting argument that "Section 1981 does not contain an anti-retaliation provision" because "it is foreclosed by Supreme Court and circuit precedent, which hold retaliation to be a form of differential treatment subsumed in the antidiscrimination language of Section 1981"); Pet. App. 20a ("[T]he issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does."); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) ("We hold that an employee's claim that he was subjected to retaliation because he complained of race discrimination is a cognizable claim under § 1981(b)."); *Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 800-01 (9th Cir. 2003) (reaffirming prior holding that where "a plaintiff charges an employer with racial discrimination in taking retaliatory action, a cause of action under § 1981

has been stated"); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1258 (10th Cir. 2001) ("Both Title VII and § 1981 support a cause of action for retaliation."); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) ("We remain of the view, in light of the broad sweep of § 1981(b), that a retaliation claim may be brought under § 1981."); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1412-13 (11th Cir. 1998) (claim alleging "retaliation due to filing a race-based claim with the EEOC . . . is cognizable under the amended section 1981"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1054, 1059 (8th Cir. 1997) ("[A] claim of retaliation, in a racial discrimination context, can violate both Title VII and 42 U.S.C. § 1981.").

Confronted with the unanimity of the circuits on this issue, Cracker Barrel attempts to create legal uncertainty where none exists by arguing that the Seventh and Eleventh Circuits recently "reversed course" on this issue. Pet. 7, 9. Not true. Both circuits agree that retaliation claims arising after the 1991 Act may be brought under section 1981, and they never held otherwise. Pet. App. 20a; *Andrews*, 140 F.3d at 1412-13. Although both circuits limited standing to bring a retaliation claim under section 1981 to individuals who complained of discrimination they personally suffered, *see Hart v. Transit Mgmt. of Racine, Inc.*, 426 F.3d 863, 865-66 (7th Cir. 2005), and *Little v. United Techs.*, 103 F.3d 956, 961 (11th Cir. 1997), neither circuit held that retaliation was never actionable under section 1981.[1] Indeed, that was an open issue in the

[1] The Seventh Circuit overruled *Hart* on an issue not presented here, *i.e.*, whether an individual may sue under section 1981 for being retaliated against for opposing discrimination suffered by someone outside his or her protected class. Pet. App. 30a-31a. The Eleventh Circuit has yet to revisit that issue in light of this Court's decision in

(Continued on following page)

Seventh Circuit before *Humphries* was decided. Pet. App. 19a ("This is the first opportunity we have had since the enactment of the Civil Rights Act of 1991 to revisit the issue of whether section 1981 forbids all retaliatory discharge claims. Cracker Barrel contends that our decision in *Hart* has already foreclosed retaliation claims under section 1981. This is incorrect.") (citation omitted). The Eleventh Circuit likewise noted that, after *Little*, the issue whether section 1981 forbids retaliation "remained open" in the Eleventh Circuit. *Andrews*, 140 F.3d at 1412. Thus, neither circuit changed course on this issue as claimed by Cracker Barrel. Pet. 7.

Cracker Barrel's characterization that there is an "apparent intra-circuit split" on this issue in the Sixth Circuit is equally misleading. Pet. 8. The Sixth Circuit has not yet decided whether after the 1991 Act retaliation claims are cognizable under section 1981. It has hinted in dicta that it would recognize such claims, but the issue has not been squarely before it. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573-76 (6th Cir. 2000) (relying heavily on *Sullivan* and observing that "it is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981 . . . for discrimination based upon his advocacy on behalf of minorities . . . "). Cracker Barrel suggests that *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984), is evidence of an internal split, but that case is inapposite for two reasons. First, *Day* was

---

Jackson. And contrary to Cracker Barrel's argument, *Andrews* does not conflict with *Little*. Pet. 7. The plaintiff in *Andrews* was retaliated against for complaining about discrimination she personally suffered, while the *Little* plaintiff, like the *Hart* plaintiff, complained of retaliation for opposing discrimination suffered by someone outside her protected class. *Andrews*, 140 F.3d at 1412-13.

decided before both *Patterson* and the 1991 Act. Second, the section 1981 claim in *Day* was abandoned on appeal, and the Sixth Circuit therefore reached no conclusion about whether retaliation claims are viable under section 1981. *Day*, 749 F.2d at 1202. Moreover, even if there were an "intra-circuit split" in the Sixth Circuit, that would still not warrant review by the Court. *See* S. Ct. Rule 10. The Sixth Circuit is capable of and responsible for resolving any internal conflict by, for example, conducting an en banc review. *See Gaddis v. Redford Twp.*, 364 F.3d 763, 770 (6th Cir. 2004) ("We have a settled procedure for resolving cases of intra-circuit conflict."). Therefore, nothing about the state of the law in the Sixth Circuit supports Cracker Barrel's petition for a writ of certiorari.

In sum, the circuit courts to consider this issue are in agreement that retaliation claims are cognizable under section 1981. In fact, just two months ago in an opinion written by Judge Wilkinson, the Fourth Circuit joined the other circuits on this issue. *Aleman*, 485 F.3d at 213-14. Thus, because there is no confusion, no disagreement, and no split in the circuits for this Court to resolve, Cracker Barrel's petition should be denied.

B. The Issue Is Already Settled By Supreme Court Precedent.

It is no surprise that there is no circuit split on this issue because Supreme Court precedent has settled the question. Two of the Court's decisions, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), taken separately or together, resolve the question whether retaliation claims are cognizable under section 1981. Those cases

hold that (1) section 1982 (the companion statute to section 1981) supports retaliation claims, *see Sullivan*, 396 U.S. at 237; and (2) retaliation "is a form of 'discrimination' because the complainant is being subjected to differential treatment," *Jackson*, 544 U.S. at 174.

In *Sullivan*, a white homeowner rented a house to a black man and sought to assign him a membership interest in a private community park. 396 U.S. at 234-35. The corporation that owned the park refused to approve the assignment to a black man, and when the white homeowner protested, the corporation retaliated by expelling him from the corporation. *Id.* The Supreme Court recognized the white homeowner's right to sue under section 1982 because he had been "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* Although the word "retaliation" never appears in *Sullivan* or in the text of section 1982, this Court later explained that "in *Sullivan* we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson*, 544 U.S. at 176.

The applicability of *Sullivan* to section 1981 cannot be questioned because both sections 1981 and 1982 were carved from section 1 of the Civil Rights Act of 1866 and therefore share the same general purpose and historical origins. *See, e.g., Gen. Bldg. Contractors*, 458 U.S. at 384; *Runyon*, 427 U.S. at 170; *Tillman*, 410 U.S. at 439-40. There is simply no meaningful analytical reason to conclude that section 1982 prohibits retaliation while section 1981 does not. Indeed, this Court often looks to section 1982 to interpret section 1981. *See Gen. Bldg. Contractors*, 458 U.S. at 384; *Runyon*, 427 U.S. at 170; *Tillman*, 410 U.S. at 439-40. For example, in *Runyon*, the Court relied on *Jones v. Alfred*

H. Mayer Co., 392 U.S. 409, 423-24 (1968), a case holding that section 1982 prohibits discrimination in the private sector as well as by state actors, to hold that section 1981 also applies in the private sector. *Sullivan* was decided nearly 40 years ago, and Congress has not deemed it necessary to alter its holding that retaliation claims are actionable under section 1982. In fact, in passing the 1991 Act, Congress *strengthened* section 1981, knowing that the Court uses the same principles to interpret sections 1981 and 1982.[2] Thus, the Court should deny Cracker Barrel's petition because the matter is settled by *Sullivan*.

More recent Supreme Court precedent also eliminates any need for review of this case. In *Jackson v. Birmingham Board of Education*, a male coach of a high school girls' basketball team complained to his supervisors that the girls' team did not receive equal funding and access to athletic equipment and facilities. 544 U.S. at 171-72. In retaliation for his complaints, he was removed as the team's coach. *Id.* at 172. The coach sued under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

---

[2] Because *Sullivan* interprets a statute, as opposed to the Constitution, this Court gives it special deference as precedent. *Patterson*, 491 U.S. at 172-73 ("[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

education program or activity receiving Federal financial assistance."

The lower courts had held that the coach could not bring a retaliation claim under Title IX because the word "retaliation" does not appear in the statute. In rejecting that overly restrictive reading of Title IX, this Court held that retaliation is a form of discrimination and as such is a cognizable claim under Title IX:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. **Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.** We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Jackson, 544 U.S. at 173-74 (bold emphasis added, italics in original).

Jackson is on point here because, like Title IX, section 1981 does not use the word "retaliation" and instead broadly prohibits differential treatment. According to *Jackson*, that broad prohibition encompasses retaliation because retaliation is differential treatment on the basis of a complaint *about discrimination*. That rationale applies equally to section 1981 because retaliation for opposing

race discrimination is differential treatment based on the racial nature of the complaint. Further proof that *Jackson* resolved this issue in the context of section 1981 is that *Jackson* relied heavily on *Sullivan* and expressly concluded that "retaliation for advocacy on behalf of a black lessee in *Sullivan* was *discrimination on the basis of race*." *Id.* at 176-77 (emphasis added).

In holding that retaliation is a form of discrimination prohibited by Title IX, *Jackson* reasoned that it should interpret Title IX broadly because Congress wrote it in broad terms and therefore "gave the statute a broad reach." *Id.* at 175. Likewise, section 1981 is written in broad terms, and it simply cannot be disputed that Congress – both in 1866 and in 1991 – intended to give section 1981 a broad reach. The careful and thorough analysis of the 1866 Act in *Jones v. Alfred H. Mayer Co.*, leaves no doubt that Congress intended the 1866 Act to have an expansive scope. 392 U.S. at 422 & 426-27 (holding that the 1866 Act "was cast in sweeping terms" to prohibit "*all* racially motivated deprivations of the rights enumerated in the statute" and further stating that such "broad language" was not a "mere slip of the legislative pen") (emphasis in original). *See also Sullivan*, 396 U.S. at 237 (cautioning against a "narrow construction of the language of § 1982" because it "would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived."). And in 1991, Congress strengthened and expanded the broad sweep of section 1981. *Rivers v. Ry. Express, Inc.*, 511 U.S. 298, 303 (1994); *Jones,* 541 U.S. at 372 n.17. The very first sentence of the 1991 Act states that it is intended to "*strengthen and improve* Federal civil rights laws . . . " Civil Rights Act of

1991, 105 Stat. at 1071 (emphasis added). The statute further states that one of its purposes is "to respond to recent decisions of the Supreme Court by *expanding* the scope of the relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* at Sec. 3(4) (emphasis added). Because section 1981 is an intentionally broadly written statute, the holding in *Jackson* that retaliation is a form of discrimination applies with equal force to section 1981.

Sullivan and *Jackson* already resolved all the issues needed to determine whether section 1981 prohibits retaliation. *Jackson* is a very recent case, and the holding in *Sullivan* was reaffirmed in *Jackson*. Neither *Sullivan* nor *Jackson* has caused confusion in the circuit courts, which all agree that retaliation claims are cognizable under section 1981. Thus, because this Court has already spoken on these issues, and because there is no confusion in the circuit courts, the Court need not grant Cracker Barrel's petition for a writ of certiorari.

C. The Seventh Circuit's Interpretation Of Section 1981 Is Uncontroversial And Appropriate.

Cracker Barrel contends that this Court should grant review because *Humphries* "ignore[d]" the text of the statute and "relied heavily, if not exclusively," on the legislative history of section 1981. Pet. 9. Nothing could be further from the truth, as even a cursory reading of the opinion makes clear. Instead, Cracker Barrel is really claiming that because section 1981 does not use the word "retaliation," the Seventh Circuit's analysis has no "textual support." Pet. 9. Cracker Barrel is wrong.

The structure and language of section 1981(b) make clear that it prohibits retaliation. Section 1981(b) states "for purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." It is unsurprising that this list, which is cast in terms of the most basic categories of contract activity – performance, modification, and termination – does not refer to the legal claim of retaliation, or, for that matter, discrimination and harassment. Yet there has never been any doubt that racial discrimination claims are actionable under section 1981. *See, e.g., Runyon*, 427 U.S. at 169 ("It is now well established that § 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts."). As for harassment claims, the Court has already recognized that Congress enacted the 1991 Act in part to undo *Patterson's* holding that harassment claims are not cognizable under section 1981, even though the word "harassment" is not included in the amended section 1981. *See Jones*, 541 U.S. at 372-73. Thus it cannot be that the absence of the word "retaliation" from the list of contract-related activities in section 1981(b) means that such claims are not cognizable under section 1981.

Furthermore, in focusing exclusively on the absence of the word "retaliation" from section 1981, Cracker Barrel itself ignores the text of the 1991 Act, which is the best indication of the statute's purpose. The 1991 Act states that the purpose of the Act is "to expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, 105 Stat. at 1071, at Sec. 3(4). Cracker Barrel's

proposed narrow reading of section 1981 to exclude retaliation is at odds with this purpose.

Moreover, it is entirely proper to turn to the legislative history of the 1991 Act to confirm that Congress intended for retaliation, like harassment and discrimination, to be prohibited conduct. That is exactly what the Court did in *Zedner v. United States*, 126 S. Ct. 1976 (2006), where eight Justices acknowledged that the Court's "interpretation [of the Speedy Trial Act] is entirely in accord with the Act's legislative history." *Id.* at 1985 (quoting at length from House and Senate Reports). Indeed, the Court previously relied on the legislative history of this very statute – the 1991 Act – to confirm its conclusion that Congress did not intend the statute to apply retroactively. *See, e.g., Rivers*, 511 U.S. at 305-09; *see also Landgraf*, 511 U.S. at 262 ("The relevant legislative history of the 1991 Act reinforces our conclusion . . . ").

In addition, the relevant legislative history at issue here is the most authoritative of all legislative history – the Committee Reports. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation.' ") (citations omitted). In this case, the House Committee Report "confirms that Congress intended retaliation to be included within section 1981." Pet. App. 21a; *see also, e.g.*, H.R. REP. NO. 102-40, pt. I, at 90 (1991) ("The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to,

claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring."), *id.* at 92 ("In cutting back the scope of the rights to 'make' and 'enforce' contracts[,] Patterson also has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981. Section 210 would restore rights to sue for such retaliatory conduct.") (citations omitted).[3]

In any event, the Seventh Circuit did not rely "heavily, if not exclusively" on the legislative history. Pet. 9. To the contrary, it was only a small part of the rationale in the *Humphries* decision, and the use of legislative history to confirm the conclusion reached by every circuit court to consider this question is certainly not a reason to grant the writ of certiorari.

D. Cracker Barrel's Policy Argument Regarding Overlap Between Section 1981 And Title VII Is Irrelevant, Wrong, And Not A Reason To Grant The Writ.

Cracker Barrel contends that public policy supports granting the writ because allowing retaliation claims under section 1981 would "eviscerate" certain administrative procedures required under Title VII. Pet. 16. Cracker Barrel argues that the Court should grant the writ to end the "senseless conflict" between Title VII and section 1981. Pet. 17. That is not a proper reason to grant the writ. As the Court has recognized, Congress *intended* to allow plaintiffs to proceed under both Title VII and section 1981

---

[3] There was no Senate Committee Report for the 1991 Act. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2183 n.5 (2007) (Ginsburg, J., dissenting).

independently, despite the absence of Title VII's administrative procedures in section 1981:

> [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. In particular, Congress noted "that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, *42 U.S.C. § 1981,* and that the two procedures augment each other and are not mutually exclusive." Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981.

Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975) (citations omitted). *See also Runyon*, 427 U.S. at 174 & n.11 (same). Congress knew in 1991 that overlap existed in the two statutory schemes, but rather than eliminate the overlap, Congress *increased* the coverage of section 1981 to include post-formation conduct, which had the obvious effect of expanding the overlap with Title VII. *Cf.* Civil Rights Act of 1991, § 102(b)(4) ("Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).").

By increasing the coverage of section 1981, Congress recognized that it has a purpose and function beyond any overlap with Title VII. There are many retaliation claims that cannot be brought under Title VII, and removing all retaliation claims from the ambit of section 1981 would leave those plaintiffs with no avenue for relief. For example, employers with fewer than 15 employees are not

covered by Title VII. 42 U.S.C. § 2000e(b). In 1990, the Senate found that section 1981 "is the only federal law banning race discrimination applicable to the 3.7 million firms with fewer than 15 employees." S. REP. NO. 101-315, pt. IV. Independent contractors are not protected by Title VII. 42 U.S.C. § 2000e(b). Neither are employees of bona fide private membership clubs, 42 U.S.C. § 2000e-2(a), certain government entities, 42 U.S.C. § 2000e(b), Indian tribes, *id.*, and Alaska Native Corporations, 43 U.S.C. § 1626(g) (2000).[4] Furthermore, section 1981 applies to all contracts outside the employment context. *See Rivers*, 511 U.S. at 304 ("Moreover, § 1981 (and hence § 101 [of the Civil Rights Act of 1991]) is not limited to employment; because it covers *all* contracts, a substantial part of § 101's sweep does not overlap Title VII.") (emphasis in original, citations omitted). Because there is no overlap between Title VII and section 1981 in a substantial number of employment and non-employment cases, excluding retaliation claims from section 1981 on the basis of a partial overlap with Title VII would be unwarranted.

Moreover, there are compelling public policy arguments in support of the unanimous status quo, which allows retaliation claims to proceed under section 1981. First, removing retaliation claims from the purview of

---

[4] The Fourth Circuit's recent decision to join the other circuits on the section 1981 issue is a perfect example of how removing retaliation claims from section 1981 would leave many people without a remedy. In *Aleman*, a Caucasian employee was terminated for reporting discrimination against Hispanic employees. 485 F.3d at 209. His employer was an Alaska Native Corporation, which is not covered by Title VII. 43 U.S.C. § 1626(g). The Fourth Circuit correctly held that retaliation claims are viable under section 1981 and that the exemption for Alaska Native Corporations in Title VII does not apply to section 1981. *Id.* at 213-14.

section 1981 would undermine the statute by giving employers and other contractors free rein to punish individuals for attempting to enforce their rights under the statute. Retaliation must be prohibited by section 1981 to ensure that the statute is "an available and effective remedy for racially motivated employment discrimination." *Choudhury*, 735 F.2d at 43. "[A]n employee who is punished for seeking administrative or judicial relief . . . has failed to secure that right to equal treatment which constitutes the fundamental promise of § 1981." *Id.* Allowing retaliation for reporting discrimination under section 1981 to go unchecked would render the statute meaningless because "[t]he ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself." *Goff v. Cont'l Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982). As this Court explained in the context of Title IX, "[i]f recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Jackson*, 544 U.S. at 180. The Court expressed the same concerns in the context of section 1982. *Sullivan*, 396 U.S. at 237 (noting that without protection against retaliation, the underlying discrimination is perpetuated).

A second policy reason supporting the lower courts' unanimous interpretation of the statute is that recognition of a cause of action under section 1981 will help reduce federal litigation. Allowing employers and other contractors to retaliate against individuals for reporting discrimination would create a strong disincentive for individuals to report discrimination internally in the hopes of resolving the issue without resorting to a federal lawsuit. In the context of employment, instead of encouraging internal dispute resolution, the removal of retaliation claims from section

1981 would only encourage employees to file suit without first allowing the employer to remedy the situation. *Compare with Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing affirmative defense in Title VII harassment cases where employer can avoid liability if the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer"). Thus, in addition to the substantive legal reasons for denying Cracker Barrel's petition, these policy reasons support the denial as well.

Even if this Court were inclined to address the limited overlap between Title VII and section 1981, this is not the proper case to highlight any potential abuse of that overlap. Mr. Humphries did not circumvent the administrative procedures required by Title VII. He timely filed a charge with the EEOC, which investigated and issued a right-to-sue letter. Therefore, even if the limited overlap were a legitimate concern and a reason to grant the writ, the facts of this case do not put the issue squarely before the Court.

E. This Case Is An Inappropriate Vehicle For Deciding Whether Retaliation Claims Are Cognizable Under Section 1981 Because Cracker Barrel Forfeited The Issue By Failing To Raise It Before The District Court.

Finally, the Court should deny the writ because Cracker Barrel forfeited the issue when it failed to argue in the district court that retaliation claims are not cognizable under section 1981.[5] The Seventh Circuit acknowledged

[5] Mr. Humphries preserved this argument by timely presenting it to the Seventh Circuit. Pet. App. 5a-7a.

that Cracker Barrel forfeited the section 1981 issue but nevertheless chose to consider and resolve it "in the interests of justice." Pet. App. 7a. Justice, however, would only be served if this Court denies review of the section 1981 issue because, based on Cracker Barrel's inaction in the district court, Mr. Humphries proceeded solely on his section 1981 claims after the district court dismissed his Title VII claims.

Contrary to Cracker Barrel's implication (which was echoed by Judge Easterbrook in his dissent below), Pet. 16, Pet. App. 41a, Mr. Humphries timely filed a charge of discrimination and retaliation with the EEOC. He also timely filed his *pro se* complaint in the district court, raising claims under both Title VII and section 1981. The district court dismissed the Title VII claims only because Mr. Humphries tried unsuccessfully to proceed *in forma pauperis* and missed the ninety-day deadline for paying his filing fee. After the district court's denial of his IFP application, Mr. Humphries – still proceeding *pro se* – filed two amended IFP applications to clarify issues raised by the district court. The court nevertheless denied both amended applications and ordered Mr. Humphries to pay the fee. Although Mr. Humphries paid the fee, the district court dismissed the Title VII claims because more than ninety days had passed since Mr. Humphries had received his right-to-sue letter.

Despite having compelling arguments that the district court abused its discretion in dismissing the Title VII claims, Mr. Humphries did not appeal those dismissals because he had viable claims under section 1981. Had Cracker Barrel put Mr. Humphries on notice in the district court that it was challenging the viability of his section 1981 retaliation claim, Mr. Humphries would have certainly appealed the dismissal of his Title VII retaliation

claim. Instead of raising the issue in the district court, Cracker Barrel sandbagged Mr. Humphries by raising the section 1981 issue only after it was too late to appeal the dismissal of his Title VII retaliation claim. If the Court were to grant review of this case, it would not only severely prejudice Mr. Humphries, but it would encourage such tactics and reward parties for failing to raise issues in the lower courts. Therefore, in addition to the unanimity in the circuits and controlling Supreme Court precedent on the section 1981 issue, the Court should deny the writ due to Cracker Barrel's inaction in the district court.

CONCLUSION

Cracker Barrel has not established any reason for this Court to grant its petition for a writ of certiorari. Therefore, Mr. Humphries respectfully requests that the petition be denied.

Respectfully submitted,

CYNTHIA H. HYNDMAN
Counsel of Record
ANGEL M. KRULL
ALEEZA M. STRUBEL
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive,
Suite 1700
Chicago, Illinois 60606
(312) 663-3100 (Telephone)
(312) 663-0303 (Fax)

Counsel for Respondent
Hedrick G. Humphries

62

(3)

No. 06-1431

Supreme Court, U.S.
FILED
JUL 27 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

MICHAEL W. HAWKINS
Counsel of Record
MICHAEL J. NEWMAN
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY TO
RESPONDENT'S OPPOSITION BRIEF 1

A. Two Recent Supreme Court Cases Further Support Petitioner's Arguments for Granting *Certiorari* and Undercut Respondent's Arguments in Opposition. 1

1. *Ledbetter v. The Goodyear Tire & Rubber Co.*, Inc., __ U.S. __, 127 S. Ct. 2162 (2007) 1

2. *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, 168 L. E. 2d 467 (2007) 4

B. Respondent's Brief in Opposition Ignores the Difference Between Retaliation and Discrimination Based on Race 6

C. Respondent Fails to Recognize the Distinct Differences Between *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and the Present Petition 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Burlington N. & Santa Fe Ry. v. White,
__ U.S. __, 126 S. Ct. 2405 (2006) 6, 7

Delaware State College v. Ricks,
449 U.S. 250 (1980) 2

Humphries v. CBOCS West, Inc., 474 F.3d 387
(7th Cir. 2007) 3, 8, 9

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 7, 8

Ledbetter v. The Goodyear Tire & Rubber Co., Inc.,
__ U.S. __, 127 S. Ct. 2162 (2007) 1, 2

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 2

Nat'l Ass'n. of Home Builders v. Defenders of Wildlife,
__ U.S. __, 168 L. E. 2d 467 (2007) 1, 4, 5

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 5

STATUTES AND REGULATIONS:

16 U.S.C. § 1536(a)(2) (2006) 4

33 U.S.C. § 1342 (2006) 4

42 U.S.C. § 1981 (2006) 1, 3, 5, 6, 7, 8

42 U.S.C. § 2000e-5 (2006) 2, 3

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION BRIEF

Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of *Certiorari* to this Court.

A. Two Recent Supreme Court Cases Further Support Petitioner's Arguments for Granting *Certiorari* and Undercut Respondent's Arguments in Opposition.

The Court's reasoning in *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007), and *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, 168 L. E. 2d 467 (2007), further illustrates the importance of granting this petition and undercuts Respondent's Brief in Opposition. If the Court does not address the sole legal issue presented here - whether a race retaliation claim is cognizable under 42 U.S.C. § 1981 - the lower courts will retain *carte blanche* to ignore the administrative prerequisites of Title VII, and employees will continue to circumvent those same prerequisites.

1. *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007).

In *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007), the Court, in an opinion written by Justice Alito, specifically addressed the importance of the administrative scheme in Title VII, which is under assault by the Seventh Circuit's decision at issue in this petition. In particular, the Court focused on the issue of whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 based on pay discrimination where the actual decision to implement discriminatory pay took place

outside Title VII's statute of limitations, but the employee received some discriminatory pay within the statute of limitations. *Id.* at 2166.

The Court responded that where an employee seeks to challenge an alleged unlawful employment practice like discriminatory pay (or like in this petition, retaliation), the employee must file an EEOC charge within 180 days after the alleged unlawful employment practice occurs. *Id.* If the employee fails to do so, "the employee may not challenge [the alleged unlawful] practice in court." *Id.* at 2166-67 (citing 42 U.S.C. § 2000e-5(f)(1)).

The Court reinforced its long-standing view that "[s]tatutes of limitations serve a policy of repose." *Id.* at 2170. In particular, "[t]he EEOC filing deadline 'protects employers from the burden of defending claims arising from employment decisions that are long past.'" *Id.* (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980)). Congress has specifically demonstrated a "strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation" by virtue of its mandate that employees file charges within 180 days after an alleged unlawful employment practice occurs. *Id.* at 2170-71.

If an employee fails to comply with Congress' mandated statutes of limitations for filing a charge or a lawsuit under Title VII, the employee is without a remedy under Title VII, a result Congress has endorsed in the employment realm. *Id.* at 2171-72 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), for the proposition that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law"). *See also* 42 U.S.C. § 2000e-5(e)(1) (2006) (barring an employee

from bringing a charge of discrimination against an employer if he/she does not do so "within one hundred and eighty days after the alleged unlawful employment practice"); 42 U.S.C. § 2000e-5(f)(1) (2006) (barring a charging party from filing a lawsuit in federal court if he/she does not do so within 90 days of receiving a notice of right to sue letter from the EEOC).

The Seventh Circuit's holding in this case allows would-be plaintiffs to bring a retaliation claim against an employer under 42 U.S.C. § 1981 even though the employee fails to comply with Title VII's procedural requirements and its statutes of limitations. The Seventh Circuit's decision allows these plaintiffs to circumvent the statutory requirements created by Congress in Title VII by reading 42 U.S.C. § 1981 "to have the same substantive content as Title VII, but without [the] features [that] employees find inconvenient" and Congress found necessary. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 409 (Easterbrook, J., dissenting).

The Respondent in this case has thus far successfully convinced the lower courts that compliance with Title VII's procedural requirements is unnecessary because Respondent and similar employee plaintiffs can currently use Section 1981 to revive Title VII's remedies, including retaliation, after those remedies are precluded due to the running of the 180-day or 90-day statute of limitations. *See id.* at 389, 391 (noting that "[t]he district court dismissed [Respondent's] Title VII claims due to procedural deficiencies").

As Judge Easterbrook correctly pointed out in his dissenting opinion at the Seventh Circuit Court of Appeals, "[t]his is not the first time a disgruntled employee has turned to § 1981 after missing the [90-day] deadline for litigation under Title VII." *Id.* at 409 (Easterbrook, J., dissenting). If

this Court does not address the merits of this case, it certainly will not be the last time an employee ignores the Congressional requirements of Title VII in employment discrimination cases.

The Court should grant *certiorari* in this case and put an end to the lower courts' misapplication of Congress' clear instructions regarding Title VII and employment discrimination.

2. *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, L. E. 2d 467 (2007).

In *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, 168 L. E. 2d 467, 476 (2007), the Court, in a decision written by Justice Alito, addressed the interplay between two federal environmental statutes: (1) Section 402(b) of the Clean Water Act ("CWA") at 33 U.S.C. § 1342(b); and (2) Section 7(a)(2) of the Endangered Species Act of 1973 ("ESA") at 16 U.S.C. § 1536(a)(2). In particular, the Court analyzed the effect a general statute (§ 7(a)(2) of the ESA) has over a specific statute (§ 402(b) of the CWA).

Section 402(b) of the CWA provides that the Environmental Protection Agency "shall approve a transfer application" to a state desiring to administer its own permit program for discharges into navigable waters "unless it determines that the State lacks adequate authority to perform [an exclusive list of] nine functions specified in the section." *Id.* at 483 (internal quotes deleted). Section 7(a)(2) of the ESA "provides that each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . .

is not likely to jeopardize endangered or threatened species or their habitats." *Id.* at 484 (internal quotes deleted).

In the context of statutory repeals by implication, Justice Alito, writing for the majority, stated the following: "We will not infer a statutory repeal unless [a] later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all." *Id.* (internal quotes deleted). Based on this proposition of law, the Court deemed that the Ninth Circuit's broad reading of Section 7(a)(2) of the ESA subsumed the more specific statute (Section 402(b) of the CWA) and in effect eviscerated Congress' intent with regards to the more specific statute. *Id.* at 485 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), for the proposition that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum"). In other words, it is illogical to conclude that Congress would create a statute with specific requirements only to have that statute subsequently take a back seat to a more general statute.

National Association of Home Builders relates to this petition for one reason – Respondent herein, with the Seventh Circuit's endorsement, seeks to use a later enacted broad statute addressing racial discrimination in contracts (Section 1981, as amended in 1991) to subsume a more specific statute that expressly addresses retaliation in the employment context (Title VII). Respondent seeks to include a claim for retaliation in the employment context under Section 1981, which would effectively nullify the administrative requirements and statutes of limitations prescribed by Congress in Title VII as they pertain to claims of retaliation in the employment setting.

The Court should address the merits of this petition because the lower courts are permitting Title VII to take a back seat to Section 1981 by reading a retaliation clause into Section 1981 where Congress did not specifically include one.

B. Respondent's Brief in Opposition Ignores the Difference Between Retaliation and Discrimination Based on Race.

Respondent asserts that Congress broadened 42 U.S.C. § 1981 in the 1991 Civil Rights Amendments for purposes of including a cause of action for retaliation where an individual is retaliated against for filing a complaint about racial discrimination. Brief of Respondent in Opposition at 4. This claim, however, ignores the real distinction between anti-discrimination and anti-retaliation provisions, which, in the end, shows that Congress actually intended to exclude retaliation from 42 U.S.C. § 1981.

In 2006, the Court, in an opinion written by Justice Breyer, distinguished between the anti-discrimination clause and the anti-retaliation clause in Title VII:

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial . . . status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their ***status***. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their ***conduct***.

Burlington N. & Santa Fe Ry. v. White, __ U.S. __, 126 S. Ct. 2405, 2412 (2006).

By its plain language, 42 U.S.C. § 1981 does not have a clause providing for a cause of action to prevent harm to an individual based on what he/she does (*e.g.*, his/her filing a discrimination complaint). Section 1981 only provides that "all persons . . . shall have the same right in every state and territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (2006). If a contracting party under Section 1981 retaliates because the other party complained about discrimination, the retaliation is based on the fact that the complaining party complained (*i.e.*, it is based on the complaining party's conduct), not because that person is being denied a right enjoyed by white citizens. *See Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2412. Section 1981 protects individuals based on their status, not their conduct.

The Seventh Circuit's contravention and lack of insight into *Burlington Northern & Santa Fe Railway's* distinction between race-based discrimination and retaliation shows that the law, as written by Congress, is being ignored. Accordingly, this petition should be granted to address the current misapplication of 42 U.S.C. § 1981 to claims of retaliation.

C. Respondent Fails to Recognize the Distinct Differences Between *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and the Present Petition.

Respondent asserts that the Court's decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), governs whether the Court should grant or deny this petition for a writ of *certiorari*. However, *Jackson* not only does not

control the issue in this case, but Title IX, to which *Jackson* is addressed, is fundamentally different than 42 U.S.C. § 1981.

In *Jackson*, 544 U.S. at 173-74, the Court, in an opinion written by Justice O'Connor, did hold that retaliation is actionable under Title IX. Furthermore, as Respondent aptly points out, "like Title IX, Section 1981 does not use the word 'retaliation.'" Brief of Respondent in Opposition at 11. However, Section 1981, unlike Title IX, has a corresponding statute (*i.e.*, Title VII) that provides for fundamental relief based on retaliation in the employment context - the same context in which Respondent seeks relief in this case.

Respondent herein seeks to enforce a retaliation claim in the employment context against his employer under Section 1981 after the lower court refused to enforce his Title VII claims as procedurally barred. However, he does so despite the fact that Section 1981 specifically does not provide for retaliation.

Title VII's retaliation provision provides a specific procedural structure for employees, like Respondent, who seek to bring a cause of action for retaliation in the employment context. Such a structure did not exist under Title IX for the plaintiff in *Jackson*. Therefore, Respondent's argument that *Jackson* is herein applicable is not supported by law or fact.

CONCLUSION

A writ of *certiorari* should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals in this matter to determine whether a claim for retaliation exists under Section 1981. As noted earlier, this case "is not

the first time a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII." *Humphries*, 474 F.3d at 409 (Easterbrook, J., dissenting). If the Court does not address the merits of this case, it certainly will not be the last time an employee ignores the Congressional requirements of Title VII in employment discrimination cases, nor will it be the last time courts ignore the applicability of specific statutes and the clear intent of Congress.

For the reasons in this Reply Brief, and those in Petitioner's original Petition for Writ of *Certiorari*, the Court should grant *certiorari* in this case.

Respectfully submitted,

MICHAEL W. HAWKINS
Counsel of Record
MICHAEL J. NEWMAN
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, Ohio 4520
Telephone: (513) 977-8200
Facsimile: (513) 977-8141

Counsel for Petitioner CBOCS West, Inc.

Date: July 27, 2007

74 55086

17598 (4)

No. 06-1431

FILED
NOV 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

JOINT APPENDIX

Michael W. Hawkins
Counsel of Record
Michael J. Newman
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com
Counsel for Petitioner

Cynthia H. Hyndman
Counsel of Record
Aleeza M. Strubel
ROBINSON CURLEY
& CLAYTON, PC
300 S. Wacker Dr., Ste. 1700
Chicago, IL 60606
(312) 663-3100
(312) 663-0303 fax
chyndman@robinsoncurley.com
astrubel@robinsoncurley.com
Counsel for Respondent

Petition for Certiorari Filed April 25, 2007
Petition for Certiorari Granted September 25, 2007

Michael Zylstra
General Counsel and
Vice President
CBOCS West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, TN 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

TABLE OF CONTENTS

Relevant Docket Entries
District Court ..... JA 1
Seventh Circuit ..... JA 24

Complaint of Employment Discrimination
June 2, 2003 ..... JA 29

First Amended Complaint
July 27, 2004 ..... JA 43

Defendant's Answer and Additional Defenses
to Plaintiff's First Amended Complaint
September 17, 2004 ..... JA 60

District Court Memorandum Opinion
November 1, 2004 ..... JA 82

Exhibit P to Local Rule 56.1 Statement of
Material Facts by Plaintiff
Docket Entry 53, filed 6/28/05
Bates Numbers (CB00460 - CB00473) ..... JA 93

District Court Memorandum Opinion
October 6, 2005 ..... JA 108

Seventh Circuit Opinion
January 10, 2007 ..... JA 117

United States District Court
Northern District of Illinois

CIVIL DOCKET FOR CASE #: 1:03-cv-03765

Hedrick G. Humphries
Plaintiff,

v.

Cracker Barrel Restaurant #221
and CBOCS West, Inc.
Defendants.

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
06/02/2003	1	RECEIVED COMPLAINT with no copies. (hp) (Entered: 06/04/2003)
06/02/2003	2	CIVIL cover sheet. (hp) (Entered: 06/04/2003)
06/02/2003	3	APPLICATION by plaintiff to proceed in forma pauperis and financial affidavit. (hp) (Entered: 06/04/2003)
06/02/2003	4	MOTION by plaintiff for appointment of counsel (hp) (Entered: 06/04/2003)

06/04/2003		FORWARDED complete case file to Judge Kocoras. (hp) (Entered: 06/04/2003)
06/25/2003	5	MINUTE ORDER of 6/25/03 by Hon. Charles P. Kocoras: Plaintiff's application to proceed in forma pauperis [3-1] and motion for appointment of counsel are denied [4-1]. (See reverse of minute order.) terminating case Mailed notice (jmp) Modified on 09/30/2003 (Entered: 06/26/2003)
06/25/2003	6	PRO SE ATTORNEY APPEARANCE by plaintiff (yap) (Entered: 06/27/2003)
10/14/2003	7	RECEIVED COMPLAINT by plaintiff (Attachment). (jmp) (Entered: 10/20/2003)
10/14/2003	8	APPLICATION by plaintiff to proceed in forma pauperis (jmp) (Entered: 10/20/2003)
10/14/2003	9	MOTION by plaintiff for appointment of counsel; (jmp) (Entered: 10/20/2003)
10/22/2003	10	MINUTE ORDER of 10/22/03 by Hon. Charles P. Kocoras: Plaintiff's amended petition to proceed in forma pauperis [8-1]

		and amended motion for appointment of counsel, are denied [9-1]. Mailed notice (jmp) (Entered: 10/23/2003)
11/26/2003	15	ATTORNEY APPEARANCE for defendant by John F. Kuenstler, and William R Pokorny (jmp) (Entered: 12/12/2003)
11/26/2003	16	MOTION by defendant to dismiss plaintiff's; Memorandum in support; (Attachments); Notice. (jmp) Modified on 12/12/2003 (Entered: 12/12/2003)
12/02/2003	11	APPLICATION by plaintiff Hedrick G Humphries to proceed in forma pauperis (jmp) (Entered: 12/05/2003)
12/02/2003	12	MOTION by plaintiff for appointment of counsel (Attachment). (jmp) (Entered: 12/05/2003)
12/08/2003	13	MINUTE ORDER of 12/8/03 by Hon. Charles P. Kocoras: Plaintiff's petition (Doc 11-1) to proceed in forma pauperis and motion (Doc 12-1) for appointment of counsel are denied. As stated, this is the third time that we have denied Humphries' petition and motion

		for appointment of counsel. No further petitions or motions for appointment will be entertained. If Humphries wishes to pursue his claim, he must pay the filing fee and either retain counsel or represent himself. (See reverse of minute order.) Mailed notice (lc) (Entered: 12/09/2003)
12/08/2003	14	ENTERED JUDGMENT (lc) (Entered: 12/09/2003)
01/12/2004	17	RECEIPT regarding payment of filing in the amount of $ 150.00 receipt # 103 22307. (jmp) (Entered: 01/14/2004)
05/05/2004	18	MINUTE ORDER of 5/5/04 by Hon. Charles P. Kocoras: Status hearing set for 9:30 a.m. on 06/01/04. Plaintiff having paid the filing fee on 0112/04, order cause reinstated. At the initial hearing, parties to report on the following: 1. Possibility of settlement. 2. If no possibility of settlement exists, the nature and length of discovery necessary to prepare the case for resolution. Plaintiff is directed to advise all other parties of the Courts' action herein. Lead counsel for each party is required to attend

		the initial hearing. Mailed notice (jmp) (Entered: 05/05/2004)
05/07/2004	19	ATTORNEY APPEARANCE for defendant by Beau C. Sefton. (jmp) (Entered: 05/11/2004)
05/24/2004	20	MOTION by defendant Cracker Barrel Rest to dismiss the plaintiff's complaint; Memorandum in support (Attachments); Notice. (jmp) (Entered: 06/10/2004)
05/28/2004		SCHEDULE set on 5/28/04 by Hon. Charles P. Kocoras: Status hearing reset to 9:30 6/9/04. Telephone notice (sct) (Entered: 05/28/2004)
06/09/2004	21	MINUTE ORDER of 6/9/04 by Hon. Charles P. Kocoras: Answer brief to motion to dismiss the plaintiff's complaint [20-1] due 06/23/04. Reply to answer brief due 07/02/04. Ruling on defendant's motion to dismiss the plaintiff's complaint [20-1] set for 9:30 a.m. on 07/15/04. Status hearing held. Mailed. notice (jmp) (Entered: 06/10/2004)
06/10/2004	22	ATTORNEY APPEARANCE for plaintiff Hedrick G Humphries

		by Elizabeth J Hubertz (eav) (Entered: 06/15/2004)
06/14/2004	23	ATTORNEY APPEARANCE for plaintiff by Elizabeth J. Hubertz (gcy) (Entered: 06/15/2004)
06/15/2004		MAILED Rule 83.16 letter and appearance form to Elizabeth J Hubertz (eav) (Entered: 06/15/2004)
06/23/2004	24	OPPOSITION by plaintiff to defendant's motion to dismiss the plaintiff's complaint [20-1]; Copy of unreported cases (Attachments); Notice. (jmp) Modified on 06/24/2004 (Entered: 06/24/2004)
07/02/2004	25	REPLY by defendant in support of its motion to dismiss the plaintiff's complaint [20-1]; Notice. (jmp) (Entered: 07/06/2004)
07/15/2004	26	MINUTE ORDER of 7/15/04 by Hon. Charles P. Kocoras: Status hearing set for 8/24/04 at 9:30 a.m. Ruling held. Enter memorandum opinion: Cracker Barrel's motion to dismiss is denied [20-1]. Humphries must properly effect service by 7/30/04. Failure to do so will result in

		dismissal of the complaint and suit. Entered Memorandum Opinion. Mailed notice (cem) (Entered: 07/16/2004)
07/27/2004	27	FIRST AMENDED COMPLAINT by plaintiff; jury demand (Attachment); Notice. (jmp) (Entered: 07/28/2004)
08/16/2004	28	WAIVER of service of summons as to defendant Cracker Barrel Rest sent on 7/28/2004. (jmp) (Entered: 08/17/2004)
08/25/2004		SCHEDULE set on 8/25/04 by Hon. Charles P. Kocoras: Status hearing reset to 9:30 9/22/04. Mailed notice (sct) (Entered: 08/25/2004)
09/14/2004	29	MOTION by plaintiff Hedrick G Humphries for leave to file additional appearance of Angel M. Krull (Attachment); Notice. (jmp) (Entered: 09/17/2004)
09/16/2004	30	MINUTE ORDER of 9/16/04 by Hon. Charles P. Kocoras : Plaintiff's motion for leave to [29-1] file additional appearance of Angel M. Krull is granted [29-2]. Telephoned notice (jmp) (Entered: 09/17/2004)

09/16/2004	31	ATTORNEY APPEARANCE for plaintiff by Angel Krull. (jmp) (Entered: 09/17/2004)
09/17/2004	32	ANSWER and additional defenses to plaintiff's first amended complaint by defendant [27-1]. (vmj) (Entered: 09/20/2004)
09/17/2004	33	MOTION by defendant Cracker Barrel Rest to dismiss plaintiff's complaint; Memorandum in support; Notice. (jmp) (Entered: 09/23/2004)
09/22/2004	34	MINUTE ORDER of 9/22/04 by Hon. Charles P. Kocoras: Status hearing held and continued to 9:30 a.m. on 02/22/05. Plaintiff's answer to defendant's motion to dismiss plaintiff's complaint [33-1] is due 10/06/04. Reply due 10/18/04. The Court will rule by mail. All discovery to be completed by 02/22/05. Mailed notice (jmp) (Entered: 09/23/2004)
10/06/2004	35	OPPOSITION by plaintiff Hedrick G Humphries to defendant's motion to dismiss plaintiff's claims under Title VII [33-1] (Attachments); Notice. (jmp) (Entered: 10/08/2004)

10/06/2004	36	COURT'S COPY of unreportes cases cited by plaintiff Hedrick G Humphries (Attachments). (jmp) (Entered: 10/08/2004)
10/18/2004	37	REPLY by defendant Cracker Barrel Rest in support of its motion to dismiss plaintiff's claims under Title VII [33-1]; Notice. (jmp) (Entered: 10/19/2004)
11/01/2004	38	MINUTE ORDER of 11/1/04 by Hon. Charles P. Kocoras: We grant Cracker Barrel's motion to dismiss Humphries' claims under Title VII, with prejudice, on the basis that his Title VII claims were untimely filed [33-1]. Status hearing and close of discovery set for 2/22/05 to stand. Entered Memorandum Opinion. Mailed notice (gma) (Entered: 11/01/2004)
11/04/2004	39	LETTER from plaintiff Hedrick G Humphries to Michael W. Dobbins, Clerk dated 11/04/2004. (jmp) (Entered: 11/05/2004)
01/13/2005	40	MOTION by plaintiff to extend the discovery period; Notice. (gma) (Entered: 01/13/2005)

01/20/2005	41	MINUTE entry before Judge Charles P. Kocoras: Motion for extension of the discovery period 40 is granted. Discovery ordered closed by 3/24/2005. Status hearing reset for 3/24/2005 at 09:30 AM. Mailed notices (sct,) (Entered: 01/20/2005)
03/24/2005	42	MINUTE entry before Judge Charles P. Kocoras : Status hearing held on 3/24/2005. Defendant is given to 5/24/05 to file motion for summary judgment. Answer due by 6/14/2005. Reply due by 6/21/2005. Ruling before Honorable Charles P. Kocoras set for 7/13/2005 at 09:30 AM. Mailed notice. (sct,) (Entered: 03/24/2005)
05/16/2005	43	AGREED MOTION by CBOCS West Inc. to extend summary judgment briefing schedule. (rbf,) (Entered: 05/17/2005)
05/16/2005	44	NOTICE of Motion by John F. Kuenstler for presentment of agreed motion to extend summary judgment briefing schedule 43 before Honorable Charles P. Kocoras on 5/19/2005 at 09:30 AM. (rbf,) (Entered: 05/17/2005)

05/19/2005	45	MINUTE entry before Judge Charles P. Kocoras : Defendant's agreed motion 43 to extend summary judgment briefing schedule is granted. Defendant's motion for summary judgment is due 6/7/2005. Answer to said motion due 6/28/2005. Reply due 7/6/2005. Ruling reset from 7/13/2005 to 8/17/2005 at 9:30 a.m. Mailed notice. (sct,) (Entered: 05/19/2005)
06/07/2005	46	MOTION by Defendant CBOCS West, Inc. for summary judgment; Notice. (jmp,) (Entered: 06/14/2005)
06/07/2005	47	MEMORANDUM OF LAW by CBOCS West, Inc. in Support of its motion for summary judgment 46 (jmp,) (Entered: 06/14/2005)
06/07/2005	48	STATEMENT of material facts by Defendant CBOCS West, Inc. in support of MOTION by Defendant CBOCS West, Inc. for summary judgment 46 (Attachments). (jmp,) (Entered: 06/14/2005)
06/28/2005	49	MOTION by Plaintiff Hedrick G Humphries to strike declaration

		of Kimberly Tramel (gma,) (Entered: 06/28/2005)
06/28/2005	50	NOTICE of Motion by Angel Krull for presentment of MOTION by Plaintiff Hedrick G Humphries to strike declaration of Kimberly Tramel 49 before Honorable Charles P. Kocoras on 6/30/2005 at 09:30 AM. (gma,) (Entered: 06/28/2005)
06/28/2005	51	MEMORANDUM by Hedrick G Humphries in Support of MOTION by Plaintiff Hedrick G Humphries to strike declaration of Kimberly Tramel 49 (gma,) (Entered: 06/28/2005)
06/28/2005	52	RESPONSE by Hedrick G Humphries to MOTION by Defendant CBOCS West, Inc. for summary judgment 46 (jmp,) Modified on 8/7/2007 (air,). (Entered: 06/30/2005)
06/28/2005	53	LOCAL RULE 56.1 statement of material facts by plaintiff. (jmp,) Modified on 8/7/2007 (air,). (Entered: 06/30/2005)
06/28/2005	54	APPENDIX by Hedrick G Humphries in support of his Local Rule 56.1 statement of

material facts 53 (Exhibits). (jmp,) (Entered: 06/30/2005)

06/30/2005 55 MINUTE entry before Judge Charles P. Kocoras: Motion hearing held on plaintiff's motion to strike declaration of Kimberly Tramel. Defendant is given to 7/14/2005 to supplement the affidavit or to respond to said motion to strike. Plaintiff's reply is due 7/21/2005. Defendant's oral motion for an extension of time to 7/14/2005 to file reply in support of its motion for summary judgment, is granted. Ruling set for 8/17/2005 is stricken. The Court will rule on all pending motions by mail. Mailed notice (jmp,) (Entered: 07/01/2005)

07/14/2005 56 REPLY by defendant CBOCS West, Inc. in support of its motion for summary judgment 46 ; Notice. (mjc,) (Entered: 07/18/2005)

07/14/2005 57 RESPONSE by defendant CBOCS West, Inc. to plaintiff's motion to strike declaration of Kimberly Tramel 49 ; Notice. (mjc,) (Entered: 07/18/2005)

07/14/2005	58	RESPONSE by Defendant CBOCS West, Inc. to plaintiff's "statement of additional facts that require denial of summary judgment; Notice (Exhibits). (gcy,) (Entered: 07/19/2005)
07/21/2005	61	REPLY by Hedrick G Humphries in Support of MOTION by Plaintiff Hedrick G Humphries to strike declaration of Kimberly Tramel 49 (Exhibit); Notice. (jmp,) (Entered: 07/25/2005)
07/22/2005	59	MOTION by Plaintiff Hedrick G Humphries for leave to file supplemental authority in opposition to defendant's motion for summary judgment (gma,) (Entered: 07/22/2005)
07/22/2005	60	NOTICE of Motion by Angel Krull for presentment of MOTION by Plaintiff Hedrick G Humphries for leave to file supplemental authority in opposition to defendant's motion for summary judgment 59 before Honorable Charles P. Kocoras on 8/2/2005 at 09:30 AM. (gma,) (Entered: 07/22/2005)
07/26/2005	62	RESPONSE by defendants Cracker Barrel Restaurant #221, CBOCS West, Inc. to plaintiff's

		motion for leave to file supplemental authority in opposition to defendant's motion for summary judgment; Notice. (cdy,) (Entered: 07/29/2005)
08/01/2005	63	MINUTE entry before Judge Charles P. Kocoras : Plaintiff's motion 59 for leave to file supplemental authority in opposition to defendant's motion for summary judgment, is granted. Mailed notice (sct,) (Entered: 08/01/2005)
10/06/2005	64	MEMORANDUM OPINION Signed by Judge Charles P. Kocoras on 10/6/2005: Cracker Barrel's motion for summary judgment is granted. Humphries' motion to strike the declaration of Kimberly Tramel is denied as moot. Final Judgment entered. Case Terminated. Mailed notice(sct,) (Entered: 10/06/2005)
10/06/2005	65	ENTERED JUDGMENT on 10/6/2005. Mailed notice(sct,) (Entered: 10/06/2005)
10/17/2005	66	NOTICE of appeal by Hedrick G Humphries regarding orders 65, 64 ; Filing fee $ 255.00 paid;

		Receipt number 10714119 (dj,) (Entered: 10/18/2005)
10/17/2005	67	DOCKETING Statement by Hedrick G Humphries regarding notice of appeal 66 ; Notice of Filing. (dj,) (Entered: 10/18/2005)
10/18/2005	68	TRANSMITTED to the 7th Circuit the short record on 10/18/05 notice of appeal66. Notified counsel (dj,) Additional attachment(s) added on 10/18/2005 (dj,). (Entered: 10/18/2005)
10/21/2005	69	DESIGNATION by plaintiff of items to be included in record on appeal. (dj,) (Entered: 10/24/2005)
10/21/2005	72	ACKNOWLEDGEMENT of receipt of short record on appeal regarding notice of appeal66 ; USCA Case No. 05-4047. (cem,) (Entered: 10/27/2005)
10/25/2005	70	BILL of Costs by CBOCS West, Inc. (Sefton, Beau) (Entered: 10/25/2005)
10/25/2005	71	DECLARATION of Beau C. Sefton regarding bill of costs 70 by CBOCS West, Inc.

		(Attachments: # 1 Exhibit A# 2 Exhibit B)(Sefton, Beau) (Entered: 10/25/2005)
10/27/2005	73	MINUTE entry before Judge Charles P. Kocoras: Answer to defendant's Bill of Costs is due 11/17/2005. Reply due 12/2/2005. The Court will rule by mail. Mailed notice (sct,) (Entered: 10/27/2005)
11/03/2005	74	TRANSMITTED to the USCA for the 7th Circuit the long record on appeal 66 (USCA no. 05-4047) consisting of 2 volumes of pleadings and 3 volumes of loose pleadings. (gej,) Additional attachment(s) added on 11/7/2005 (gej,). (Entered: 11/03/2005)
11/04/2005	75	RESPONSE by Plaintiff Hedrick G Humphries to bill of costs70, declaration71 (Attachments: # 1 Exhibit Maximum Transcript Rates)(Krull, Angel) (Entered: 11/04/2005)
11/04/2005	76	NOTICE by Hedrick G Humphries re Response75 (Krull, Angel) (Entered: 11/04/2005)

12/02/2005	77	REPLY by Defendant CBOCS West, Inc. *In Support of Its Bill of Costs* (Attachments: # 1 Exhibit Exhibit A)(Kuenstler, John) (Entered: 12/02/2005)
12/06/2005	78	NOTICE by John F. Kuenstler of Change of Address (Attachments: # 1 Notification of Change)(Kuenstler, John) (Entered: 12/06/2005)
12/20/2005	79	MINUTE entry before Judge Charles P. Kocoras : This matter comes before the court on the request of Defendant CBOCS West, Inc. ("Cracker Barrel"), for a bill of costs for fees associated with depositions, transcripts, and copies of documents associated with their case. For the reasons set forth below, we award costs in the amount of $1,551.10. Mailed notice (sct,) (Entered: 12/20/2005)
02/21/2006	80	MOTION by Defendants Cracker Barrel Restaurant #221, CBOCS West, Inc. to withdraw as attorney *(Unopposed)* (Sefton, Beau) (Entered: 02/21/2006)
02/21/2006	81	NOTICE of Motion by Beau C. Sefton for presentment of motion to withdraw as attorney80 before

		Honorable Charles P. Kocoras on 2/28/2006 at 09:30 AM. (Sefton, Beau) (Entered: 02/21/2006)
02/27/2006	82	MINUTE entry before Judge Charles P. Kocoras : Beau C. Sefton and William R. Pokorny, and their law firm, Wildman, Harrold, Allen & Dixon, LLP's motion 80 to withdraw as counsel for defendant is granted. Hearing on said motion set for 2/28/06 is stricken. Attorney William R Pokorny and Beau C. Sefton terminated. Mailed notice (eav,) (Entered: 02/28/2006)
02/06/2007	83	MINUTE entry before Judge Charles P. Kocoras :Status hearing set for 2/22/2007 at 09:30 a.m. before Judge Kocoras.Mailed notice (sct,) (Entered: 02/06/2007)
02/06/2007	84	CERTIFIED copy of order dated January 10, 2007 from the Seventh Circuit regarding notice of appeal66 ; Appellate case no. : 05-4047. We Reverse the District Court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we Affirm the grant of summary judgment in favor of the defendant on

		Humphries's discrimination claim and we Remand for further proceedings in accordance with the opinion. The above is in accordance with the decision of this court entered on this date. Each party to bear its own costs. (eav,) (Entered: 02/08/2007)
02/06/2007	85	OPINION from the USCA for the 7th Circuit; Argued March 28, 2006; Decided January 10, 2007 in USCA case no. 05-4047 (eav,) (Entered: 02/08/2007)
02/06/2007	86	LETTER from the Seventh Circuit returning the record on appeal in USCA no. 5-4047 consisting of 2 volumes of pleadings and 3 volumes of loose pleadings (eav,) (Entered: 02/08/2007)
02/13/2007	87	MINUTE entry before Judge Charles P. Kocoras :Status hearing set for 2/22/2007 is reset to 3/1/2007 at 09:30 AM.Mailed notice (sct,) (Entered: 02/13/2007)
02/21/2007	88	ATTORNEY Appearance for Defendant CBOCS West, Inc. by Camille B. Conway (Conway, Camille) (Entered: 02/21/2007)

02/22/2007	89	ATTORNEY Appearance for Plaintiff Hedrick G Humphries by Cynthia H. Hyndman (Hyndman, Cynthia) (Entered: 02/22/2007)
03/01/2007	90	MINUTE entry before Judge Charles P. Kocoras :Status hearing held on 3/1/2007. This cause having been remanded from the U.S. Court of Appeals for the Seventh Circuit, the Clerk of the District Court is directed to reinstate this case pursuant to the decision of the Court of Appeals. Plaintiff is given leave to file the appearance of Cynthia Hyndman as additional counsel. Defendant is given leave to file the appearance of Camille Conway as additional counsel. Plaintiff's oral motion to vacate the judgment order awarding costs to defendants is granted. So ordered. Status hearing set for 4/3/07 at 9:30 a.m. Attorney Cynthia H. Hyndman for Hedrick G Humphries, Camille B. Conway for Cracker Barrel Restaurant added. Mailed notice (eav,) (Entered: 03/02/2007)

03/02/2007		MAILED Rule 83.16 letter and appearance forms to attorneys Cynthia Hyndman and Camille Conway (eav,) (Entered: 03/02/2007)
04/03/2007	91	MINUTE entry before Judge Charles P. Kocoras :Status hearing held on 4/3/2007. Pretrial Order to be filed on or before 5/4/2007. The Pretrial Order shall contain the following: 1. Agreed statement of material facts; 2. Lists of witnesses; 3. Lists of exhibits; and 4. Proposed voir dire. The Pretrial Order shall also contain the following: 1. Estimated length of trial; 2. Whether the trial is bench or jury; and 3. Whether all parties consent, or do not consent to proceed before a magistrate judge. Mailed notice (sct,) (Entered: 04/03/2007)
05/03/2007	92	ATTORNEY Appearance for Plaintiff Hedrick G Humphries by Aleeza M Strubel (Strubel, Aleeza) (Entered: 05/03/2007)
05/04/2007	93	PROPOSED Pretrial Order by Hedrick G Humphries, CBOCS West, Inc. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5

Exhibit E# 6 Exhibit F# 7 Exhibit G)(Krull, Angel) (Entered: 05/04/2007)

07/26/2007	94	MOTION by counsel for Plaintiff Hedrick G Humphries to withdraw as attorney (Krull, Angel) (Entered: 07/26/2007)
07/26/20007	95	NOTICE of Motion by Angel Krull for presentment of motion to withdraw as attorney94 before Honorable Charles P. Kocoras on 7/31/2007 at 09:30 AM. (Krull, Angel) (Entered: 07/26/2007)
07/30/2007	96	MINUTE entry before Judge Charles P. Kocoras : Angel M. Krull's motion for leave to withdraw as counsel for plaintiff is granted. Hearing on said motion, set for 7/31/2007, is stricken. Attorney Angel Krull terminated.Mailed notice (mjc,) (Entered: 07/31/2007)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case #: 05-4047

Hedrick G. Humphries Plaintiff-Appellant	))
v.	)
CBOCS West, Incorporated Defendant-Appellee.	))

RELEVANT DOCKET ENTRIES

10/19/05	Private civil case docketed. [05-4047] [1914589-1] Transcript information sheet due 10/31/05. Appellant's brief due 11/28/05 for Hedrick G. Humphries. (amyd)
10/19/05	[05-4047] ROA from No. Dist. of Il., E. Div. due 11/7/05. (amyd)
10/19/05	Filed Appellant Hedrick G. Humphries docketing statement. [05-4047] [1914594-1] (amyd)
10/21/05	Disclosure Statement filed by Angel M. Krull for Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (hard)
10/21/05	Filed Seventh Circuit Transcript Information Sheet by Angel M. Krull for

Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (hudk)

10/24/05 ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [1914589-1] SCO [05-4047] Appellant's brief due 12/12/05 for Hedrick G. Humphries. Appellee's brief due 1/11/06 for CBOCS West Inc . Appellant's reply brief due 1/25/06 for Hedrick G. Humphries. (hard)

11/4/05 Original record on appeal filed. Contents of record: 2 vol. pleadings; 3 vol. loose pleadings. [05-4047] [1919803-1] (darr)

11/7/05 Disclosure Statement filed by John F. Kuenstler for Appellee CBOCS West Inc. [05-4047] [1914589-1] (amyd)

11/14/05 ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [1914589-1] SCO [05-4047] Appellant's brief due 12/19/05 for Hedrick G. Humphries. Appellee's brief due 1/18/06 for CBOCS West Inc. Appellant's reply brief due 2/1/06 for Hedrick G. Humphries. (amyd)

12/19/05 Filed 15c appellant's brief by Hedrick G. Humphries. Disk filed. [05-4047] [0-0] (kare)

1/17/06	NOTICE: Angel M. Krull for Appellant Hedrick G. Humphries will not be available for oral argument Feb. 16, 27 - March 10, 2006. [05-4047] [1914589-1] (andb)
1/18/06	Filed 15c appellee's brief by CBOCS West Inc. Electronically Transmitted. [05-4047] [0-0] (andb)
2/1/06	Filed 15c appellant's reply brief by Hedrick G. Humphries. Disk filed. [05-4047] [0-0] (josh)
2/6/06	ORDER: Argument set for Tuesday, March 28, 2006 at 9:30 a.m. Each side limited to 15 minutes. [05-4047] [1951781-1](linj)
2/9/06	Oral argument confirmation card filed by attorney(s) Angel M. Krull for Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (scze)
3/6/06	Oral argument confirmation card filed by attorney(s) John F. Kuenstler for Appellee CBOCS West Inc. [05-4047] [1914589-1] (scze)
3/28/06	Case heard and taken under advisement by panel: Circuit Judge Richard A. Posner, Circuit Judge Frank H. Easterbrook, Circuit Judge Ann C. Williams. [05-4047] [1969139-1] (scze)

3/28/06	Case argued by John F. Kuenstler for Appellee CBOCS West Inc, Angel M. Krull for Appellant Hedrick G. Humphries. [05-4047] [1914589-1] (scze)
1/10/07	Filed opinion of the court by Judge Williams. We REVERSE the district court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we AFFIRM the grant of summary judgment in favor of the defendant on Humphries's discrimination claim, and we REMAND for further proceedings in accordance with the opinion. Chief Judge Frank H. Easterbrook, dissenting, Circuit Judge Richard A. Posner, Circuit Judge Ann C. Williams. [05-4047] [1914589-1] (amyd)
1/10/07	ORDER: Final judgment filed per opinion. Each party to bear its own costs. [05-4047] [2063083-1] (amyd)
1/24/07	Filed 15c Petition for Rehearing by Appellee CBOCS West Inc. Dist. [05-4047] [2068412-1] (fern)
1/29/07	ORDER: Appellee CBOCS West Inc Petition for Rehearing is DENIED. [05-4047] [2068412-1] (fern)
2/6/07	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 2 vol. pleadings; 3 vol. loose pleadings.) [05-4047] [1914589-1] (cove)

2/12/07	Filed mandate receipt. [05-4047] [2074095-1] (linj)
5/3/07	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 06-1431. [05-4047] [2100293-1] (fern)
10/1/07	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. See order for further details. Supreme Court Case No.: 06-1431. [05-4047] [2146723-1[(hard)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
_____DIVISION

CIVIL ACTION NO. 03C 3765

[Filed June 2, 2003]

Hedrick G. Humphries	)
	)
(Name of the plaintiff or plaintiffs)	)
	)
V.	)
	)
Cracker Barrel	)
Restaurant #221	)
	)
(Name of the defendant or defendants)	)
	)

COMPLAINT OF EMPLOYMENT DISCRIMINATION

1. This is an action for employment discrimination.

2. The plaintiff is Hedrick G. Humphries of the county of Cook in the state of Illinois.

3. The defendant is Cracker Barrel Restaurant #221, who resides at (street address) 50 Ken Hayes Drive (city) Bradley (county) Kankakee (state) IL (ZIP) 60915 (Defendant's telephone number) (815)-936-6055

4) The plaintiff sought employment or was employed by the defendant at (street address) 50 Ken Hayes Drive (city) Bradley (county) Kankakee (state) IL (ZIP code) 60915

5. The plaintiff [check one box]

* * *

(c) ☒ was employed but is no longer employed by the defendant.

6. The defendant discriminated against the plaintiff on or about, or beginning on or about, (month) October (day) 8, (year) 2001.

7. (a) The plaintiff [check one box] ☒ has filed a charge or charges against the defendant asserting the acts of discrimination indicated in this complaint with any of the following government agencies:

(i) ☒ the United States Equal Employment Opportunity Commission on or about (month) August (day) 9 (year) 2002.

* * *

(b) If charges *were* filed with an agency indicated above, a copy of the charge is attached. ☒ YES

It is the policy of both the Equal Employment Opportunity Commission and the Illinois Department of Human Rights to cross-file with the other agency all

charges received. The plaintiff has no reason to believe that this policy was not followed in this case.

8.

* * *

(b) ☒ the United States Equal Employment Opportunity Commission has issued a *Notice of Right to Sue*, which was received by the plaintiff on (month) March (day) 06 (year) 03 a copy of which *Notice* is attached to this complaint.

9. The defendant discriminated against the plaintiff because of the plaintiff's [check all that apply]

* * *

(b) ☒ Color (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981).

* * *

(e) ☒ Race (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981).

* * *

10. The plaintiff is suing the defendant, a state or local government agency, for discrimination on the basis of race, color, or national origin (42 U.S.C. § 1983).

☒ YES

11. Jurisdiction over the statutory violation alleged is conferred as follows: over Title VII claims by 28 U.S.C. §1331, 28 U.S.C. §1343(a)(3), and 42 U.S.C. §2000e-5(f)(3); over 42 U.S.C. §1981 and §1983 by 42 U.S.C. §1988; over the A.D.E.A. by 42 U.S.C. §12117.

12. The defendant [check all that apply]

* * *

(b) ☒ terminated the plaintiff's employment.

* * *

13. The facts supporting the plaintiff's claim of discrimination are as follows:

— September 03 2001 I received a write-up from Steve Cardin (acting G.M.) that the chain was not on the door. No dates of incident or evidence was ever provide. Write-up was used to terminate my employment.

— Made racially offensive comments to staff indicating "He was there for white employees." And wanted more white managers at the store.

— ~~November 26 2001 was ret~~

— December 05 2001 I was written-up and terminated for leaving the safe open, which was never verified or evidenced, as retaliation for citing discriminatory activity by white manager.

14. [AGE DISCRIMINATION ONLY] Defendant knowingly, intentionally, and willfully discriminated against the plaintiff.

15. The plaintiff demands that the case be tried by a jury. ☒ NO

16. THEREFORE, the plaintiff asks that the court grant the following relief to the plaintiff [check all that apply]

* * *

(f) ☒ Direct the defendant to (specify): Punitive damages for job discrimination and retaliation

(g) ☒ If available, grant the plaintiff appropriate injunctive relief, lost wages, liquidated/double damages, front pay, compensatory damages, punitive damages, prejudgment interest, post-judgment interest, and costs, including reasonable attorney fees and expert witness fees.

* * *

(Plaintiff's signature) /s/
(Plaintiff's name) Hedrick G. Humphries
(Plaintiff's street address) [REDACTED]
(City) Matteson (State) IL (ZIP) 60443
(Plaintiff's telephone number) (708)-748-[REDACTED]

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To: Hedrick G. Humphries
[REDACTED]
Matteson, IL 60443

From: Equal Employment Opportunity Commission
Chicago District Office
500 West Madison Street
Suite 2800
Chicago, Illinois 60661

Certified Mail No.: 7001 1940 0003 8832 3641

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	**EEOC Representative**
210A203462	Karen Lanners, Investigator

Telephone No.
312-353-0902

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

* * *

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to

conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -

[X] **Title VII and/or the Americans with Disabilities Act:** This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in a court of competent jurisdiction. **If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost.**

* * *

On behalf of the Commission

3-3-03 /s/
John P. Rowe, District Director

Enclosures
Information Sheet
Copy of Charge

cc: Respondent(s) Cracker Barrel Old Country Store
EEOC Form 161 (test 5/95)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☒ EEOC

CHARGE NUMBER 210A203462

Illinois Dept. of Human Rights and EEOC
State or local Agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. Hedrick G. Humphries

HOME TELEPHONE *(Include Area Code)*
(708) 748-[REDACTED]

STREET ADDRESS CITY, STATE AND ZIP CODE
[REDACTED], Matteson, IL 60443

DATE OF BIRTH
[REDACTED]/1948

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Cracker Barrel Old Country Store

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(815) 936-6022

STREET ADDRESS CITY, STATE AND ZIP CODE
50 Ken Hayes Dr., Bradley, IL 60915

COUNTY
091

* * *

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
12/05/2001	12/05/2001

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I began my employment with Respondent on or around November 23, 1998. My most recent position was Associate Manager. Beginning in or around August 2001, the store location where I was assigned came under new management. I began to be subjected to unfair and unjustified disciplinary write-ups while white managers I worked with had engaged in the same activities I had and were not disciplined. A

General Manager also made offensive comments about other employees based upon their race and national origin, which I reported to my District Manager. In or around early December 2001, I discussed with respondent General Manager and District Manager a concern that Respondent was not subjecting black and white employees to the same performance standards and that black employees were subjected to less favorable standards. The District Manager responded by telling me that I should not appear to "be outside the management group." On or around December 5, 2001, I was allegedly terminated as a result of the disciplinary write-ups despite my protests. I believe that Respondent store management and also Respondent district management has engaged in a practice of subjecting all black employees to less favorable treatment than white employees. I further believe that Respondent has engaged in a practice of replacing black employees with white employees and reducing the number of black employees.

I believe I was retaliated against and discriminated against on the basis of my race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

8-9-02 /s/ Hedrick G. Humphries
Date Charging Party *(Signature)*

NOTARY -

* * *

EEOC FORM 5 (Rev. 07/99)

AO 440 (Rev. 05/00) Summons in a Civil Action

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

SUMMONS IN A CIVIL CASE

CASE NUMBER: 03 C 3765
ASSIGNED JUDGE: KOCORAS

Hedrick G. Humphries

v.

Cracker Barrel Restaurant
#221 Bradley IL.

TO: (Name and address of Defendant)

Cracker Barrel Restaurant
50 Ken Hayes Dr.
Bradley IL. 60915

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Hedrick G. Humphries
[REDACTED]
Matteson, IL. 60443

an answer to the complaint which is herewith served upon you, _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken

against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

MICHAEL W. DOBBINS, CLERK

_____ _____

(By) DEPUTY CLERK DATE

RETURN OF SERVICE

Service of the Summons and complaint was made by me[1]

DATE 10-14-03

NAME OF SERVER *(Print)*
Hedrick G. Humphries

Check one box below to indicate appropriate method of service

☒ Served personally upon the defendant. Place where served: 50 Ken Hayes Dr. Bradley IL. 60915

* * *

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

_____ _____

Date Signature of Server

_____

Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 03 C 3765

[Filed July 27, 2004]

HEDRICK G. HUMPHRIES, Plaintiff,	)
v.	)
CBOCS WEST, INC., Defendant.	)

The Honorable Charles Kocoras
JURY DEMANDED

FIRST AMENDED COMPLAINT

Plaintiff Hedrick G. Humphries for his First Amended Complaint states as follows:

THE PARTIES

1. Plaintiff Humphries is African-American. He is a resident of Matteson, Illinois, located in Cook County, Illinois. Humphries was formerly employed by the defendant as an associate manager of its Bradley, Illinois restaurant.

2. Defendant CBOCS West, Inc., is a Nevada corporation with its headquarters in Lebanon, Tennessee. The Defendant operates a chain of restaurants and retail locations known as "Cracker Barrel Old Country Stores." Each location consists of a restaurant, featuring "home-style cooking," and a retail area, featuring rural-themed items. The acts set forth in this Complaint were permitted, authorized, tolerated, ratified, ordered and/or done by Cracker Barrel officers, agents, employees and/or representatives while actively engaged in Cracker Barrel's business.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3).

4. The employment practices alleged to be unlawful were committed within the Northern District of Illinois. Venue is therefore proper under 28 U.S.C. § 1391 and 42 U.S.C. § 2000e-(5)(f)(3).

5. Humphries has fulfilled all conditions precedent to the institution of this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Humphries timely filed his charge of race discrimination on August 9, 2002 within 300 days of the occurrence of the last discriminatory act. He filed his complaint in federal court within 90 days of his receipt of his Notice of Right to Sue from the EEOC. Copies of the Charge and the Notice of Right to Sue are attached hereto.

STATEMENT OF CLAIM

6. The Plaintiff has worked in the restaurant industry for more than 13 years. He was hired as an associate manager of the Cracker Barrel restaurant located in the Kankakee-Bradley-Bourbonnais area (hereafter "the restaurant") in November 1998. At each restaurant, Cracker Barrel employs a General Manager who supervises several Associate General Managers. In turn, the general manager is supervised by a District Manager who has responsibility for several Cracker Barrel locations.

7. For nearly three years, Humphries performed his duties well. At the annual evaluation, conducted in November 2000, he was told that his performance was satisfactory, and he received a raise.

8. In August 2001, Cracker Barrel fired the general manager of the restaurant, Donald Sessions, an African-American. Sessions had been general manager at that location since approximately 1997. A white manager, Steve Cardin, was transferred from Cracker Barrel's Tinley Park, Illinois location to serve as Acting General Manager of the restaurant. Immediately following Cardin's arrival, nonwhite employees at the restaurant became the target of numerous disciplinary reports.

9. Cardin made it clear that he regarded it as his job to reduce the number of African-Americans employed by the restaurant. He assured the white employees that he was "there for the white [employees]." Two of Humphries' white co-workers informed him of Cardin's comments.

10. On several occasions, Cardin offered his (low) opinion of Cracker Barrel's nonwhite employees. On a day when one of the restaurant's African-American cooks was absent, Cardin stated in front of several employees that the cook "must be drunk or drugged." When Cardin was asked why he thought this, Cardin replied "you know how *they* all are." Similarly, while talking to Humphries, Cardin made a disparaging reference to employee Tony Munez' "ten kids." When Humphries asked Cardin where he got the idea that Munez had a large number of children, Cardin replied, "you know how they are, those Mexicans all have a dozen kids."

11. Humphries was naturally upset at being on the receiving end of racially motivated discipline, designed to reduce the number of African-American and other nonwhite employees at the restaurant. In keeping with Cracker Barrel's nondiscrimination policy, Humphries went to District Manager William Christensen, Cardin's supervisor, at the end of August 2001, and complained to him about a verbal warning he had received since Cardin's arrival and about Cardin's remarks. Christensen wanted to know if there were any other witnesses to the racial remarks. Humphries told him that there were, but they were afraid to come forward. Christensen told Humphries not to worry about it, but did not otherwise look into the complaint or take any remedial action.

12. On several occasions, Christensen and former General Manager Sessions had discussed Cardin's racism. Christensen told Sessions that Cardin could never be a general manager of a Cracker Barrel restaurant or "we'd be involved in political problems

all the time." Indeed, Cardin, who had earlier been employed at the Bradley location, asked for a transfer to another location when Sessions was elevated to General Manager at Bradley, because he did not want to be supervised by a black man.

13. Within a few days of Humphries' complaints to Christensen about the racial remarks and racially motivated discipline, he received three more written Employee Counseling Reports from Cardin, each described as "final."

14. On September 1, 2001, Humphries received a "final" disciplinary report for allegedly using the wrong method to credit an employee's meal. The second "final" report, also issued on September 1, alleged that there was a deviation from Cracker Barrel's standard procedures for accounting. In response to this report, Humphries subsequently discovered the nature of the discrepancy and provided the information to Cardin who in turn was to contact Cracker Barrel headquarters in Lebanon, Tennessee. Despite Humphries' provision of corrected information to Cardin, the disciplinary report was not removed from Humphries' file, even after Humphries complained to Christensen about it.

15. On September 3, 2001, the third Employee Counseling Report accused Humphries of leaving the restaurant door unchained, an action which would violate Cracker Barrel's Asset Protection Policy. The report did not specify when this alleged infraction occurred, or if anyone witnessed the alleged infraction, nor did it point to any harm that befell the restaurant as a result of this alleged infraction. Humphries had

not in fact left the door unchained and complained about this report to Christensen. Christensen insisted that there were witnesses to this incident but did not offer any further information.

16. In October, Cardin stepped down as Acting General Manager and returned to Tinley Park. Humphries was concerned that the racially motivated and retaliatory discipline he had received from Cardin would affect his annual evaluation. He expressed his concerns to Christensen. Christensen told Humphries that he would not consider the Cardin-originated discipline when evaluating Humphries' job performance. Humphries' annual review seemed to confirm what Christensen said, since he was given a satisfactory rating for the previous year's service (including the time in which he received the Employee Counseling Reports described above), was given a raise, and was thanked for his service by Christensen himself.

17. In late November 2001, Humphries witnessed the termination of an African-American server, Venus Green. Green was fired by one of Humphries' fellow Associate General Managers, a white man named Joe Stennett. Stennett, had been "on loan" to the restaurant from the Tinley Park Cracker Barrel location at the same time that Cardin had been temporarily transferred from Tinley Park to serve as Acting General Manager. Not only was Green's termination based on an incorrect perception of the facts, it also occurred without adherence to Cracker Barrel's established procedures for a person with her level of service - procedures that had been

accorded to white employees under similar circumstances.

18. Humphries complained about what he considered a racially disparate and wrongful termination to Christensen. Christensen told Humphries disapprovingly that he was going "outside of management" for raising these concerns about Green's termination, but that Humphries should schedule a meeting with Ken Dowd, the new white General Manager of the Bradley location, and with Humphries' fellow Associate Manager, Stennett, on December 6, 2001.

19. On December 5, before the meeting could take place, Humphries was terminated. At first, he was simply told that the safe was found open on Monday morning and that his employment would be terminated. No details, violations of procedure, or counseling reports were provided at that time. When he pressed for details, approximately one week later, he was given an Employee Counseling Report which informed him that he had been terminated for leaving the safe door open several nights earlier. The Report revealed that his accuser was Stennett, the co-manager who had wrongfully terminated Green and who had been summoned to a meeting with the Plaintiff to discuss her termination. Stennett was the only witness to Humphries' alleged infraction. No loss was alleged to have occurred as a result.

20. Upset at an unproven allegation to which he had been given no opportunity to respond coming so closely upon the heels of his latest discussion with Christensen about racism at the restaurant,

Humphries asked Christensen for a written explanation of the reason for his termination. Christensen wrote Humphries on December 12, informing him that he was terminated, not merely for leaving the safe open on December 2, 2001, but because in September 2001, Cardin had given him a "final written warning" about leaving the store door unchained.

21. As a result of the Defendant's racially discriminatory actions, Humphries experienced severe emotional distress. He suffered financial hardship because he was the sole breadwinner for his family. In addition, Cracker Barrel deemed Humphries' termination as being "for cause" within the meaning of its ERISA plans, and denied him access to profit-sharing and pension benefits to which he otherwise would have been entitled. He still has not recovered from these losses.

COUNT I
DISCRIMINATION ON THE BASIS OF RACE IN VIOLATION OF 42 U.S.C. § 1981 AND TITLE VII

22. The Plaintiff restates and incorporates by reference Paragraphs 1- 21 above as part of this Count of the Complaint.

23. Cracker Barrel has discriminated against the Plaintiff with regard to discipline and termination because of race, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, as amended, and in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended.

24. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

25. By reason of International's discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, and other employment benefits and, as such, is entitled to all legal and equitable remedies, available under Title VII, as amended, and section 1981, as amended, including compensatory and punitive damages.

COUNT II
RETALIATION IN VIOLATION OF SECTION 1981 AND TITLE VII

26. The Plaintiff restates and incorporates by reference Paragraphs 1-25 above as part of this Count of the Complaint.

27. Cracker Barrel has retaliated against the Plaintiff with regard to discipline and termination, in violation of 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1981, as amended.

28. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

29. By reason of Cracker Barrel's discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, emotional distress, anger, and other employment benefits and, as such, is entitled to

all legal and equitable remedies available, under Title VII as amended and under section 1981, as amended, including compensatory and punitive damages.

WHEREFORE, Plaintiff Humphries respectfully requests the following relief:

a. Compensatory damages, including back pay and compensation for past and future monetary and non-monetary losses;

b. Front-pay in lieu of reinstatement;

c Attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

d. Liquidated and/or punitive damages; and

e. Any additional relief the Court deems just, including declaratory and injunctive relief.

HEDRICK G. HUMPHRIES

By: /s/ Elizabeth J. Hubertz
One of his attorneys

PLAINTIFF DEMANDS A TRIAL BY JURY.

By: /s/ Elizabeth J. Hubertz
One of his attorneys

Elizabeth J. Hubertz
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive • Suite 1700
Chicago, Illinois 60606
Phone: (312) 663-3100 • Facsimile: (312) 663-0303

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY ☒ EEOC

CHARGE NUMBER 210A203462

Illinois Dept. of Human Rights and EEOC
State or local Agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Mr. Hedrick G. Humphries

HOME TELEPHONE *(Include Area Code)*
(708) 748-[REDACTED]

STREET ADDRESS CITY, STATE AND ZIP CODE
[REDACTED], Matteson, IL 60443

DATE OF BIRTH
[REDACTED]/1948

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME
Cracker Barrel Old Country Store

NUMBER OF EMPLOYEES, MEMBERS
Cat D (501 +)

TELEPHONE *(Include Area Code)*
(815) 936-6022

STREET ADDRESS CITY, STATE AND ZIP CODE
50 Ken Hayes Dr., Bradley, IL 60915

COUNTY
091

* * *

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
12/05/2001	12/05/2001

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I began my employment with Respondent on or around November 23, 1998. My most recent position was Associate Manager. Beginning in or around August 2001, the store location where I was assigned came under new management. I began to be subjected to unfair and unjustified disciplinary write-ups while white managers I worked with had engaged in the same activities I had and were not disciplined. A

General Manager also made offensive comments about other employees based upon their race and national origin, which I reported to my District Manager. In or around early December 2001, I discussed with respondent General Manager and District Manager a concern that Respondent was not subjecting black and white employees to the same performance standards and that black employees were subjected to less favorable standards. The District Manager responded by telling me that I should not appear to "be outside the management group." On or around December 5, 2001, I was allegedly terminated as a result of the disciplinary write-ups despite my protests. I believe that Respondent store management and also Respondent district management has engaged in a practice of subjecting all black employees to less favorable treatment than white employees. I further believe that Respondent has engaged in a practice of replacing black employees with white employees and reducing the number of black employees.

I believe I was retaliated against and discriminated against on the basis of my race, black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

8-9-02 /s/ Hedrick G. Humphries
Date Charging Party *(Signature)*

NOTARY -

* * *

EEOC FORM 5 (Rev. 07/99)

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To: Hedrick G. Humphries
[REDACTED]
Matteson, IL 60443

From: Equal Employment Opportunity Commission
Chicago District Office
500 West Madison Street
Suite 2800
Chicago, Illinois 60661

Certified Mail No.: 7001 1940 0003 8832 3641

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	**EEOC Representative**
210A203462	Karen Lanners, Investigator

Telephone No.
312-353-0902

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON:

* * *

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to

conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

- NOTICE OF SUIT RIGHTS -

[X] **Title VII and/or the Americans with Disabilities Act:** This is your NOTICE OF RIGHT TO SUE, which terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in a court of competent jurisdiction. **If you decide to sue, you must sue <u>WITHIN 90 DAYS</u> from your receipt of this Notice; otherwise your right to sue is lost.**

* * *

On behalf of the Commission

3-3-03 /s/
John P. Rowe, District Director

Enclosures
Information Sheet
Copy of Charge

cc: Respondent(s) Cracker Barrel Old Country Store
EEOC Form 161 (test 5/95)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 03 C 3765
Chief Judge Kocoras

[Filed September 17, 2004]

HEDRICK G. HUMPHRIES,	)
	)
Plaintiff,	)
	)
v.	)
	)
CBOCS WEST, INC.,	)
	)
Defendant.	)
	)

DEFENDANT'S ANSWER AND ADDITIONAL DEFENSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant, CBOCS West, Inc. ("Defendant"), for its Answer and Additional Defenses to Plaintiff's First Amended Complaint, states as follows:[1]

[1] Concurrently with the instant Answer and Additional Defenses, Defendant has filed a Motion to Dismiss Plaintiff's Title VII claims.

THE PARTIES

1. Plaintiff Humphries is African-American. He is a resident of Matteson, Illinois, located in Cook County, Illinois. Humphries was formerly employed by the defendant as an associate manager of its Bradley, Illinois restaurant.

ANSWER:

On information and belief, Defendant admits that Plaintiff is African-American and that he is a resident of Matteson, Illinois. Defendant admits that Matteson, Illinois is located in Cook County, Illinois, and that Plaintiff was formerly employed by Defendant as an associate manager of its Bourbonnais, Illinois restaurant. Defendant denies the remaining allegations in Paragraph 1.

2. Defendant CBOCS West, Inc., is a Nevada corporation with its headquarters in Lebanon, Tennessee. The Defendant operates a chain of restaurants and retail locations known as "Cracker Barrel Old Country Stores." Each location consists of a restaurant, featuring "home-style cooking," and a retail area, featuring rural-themed items. The acts set forth in this Complaint were permitted, authorized, tolerated, ratified, ordered and/or done by Cracker Barrel officers, agents, employees and/or representatives while actively engaged in Cracker Barrel's business.

ANSWER:

Defendant admits that it is a Nevada corporation with its headquarters in Lebanon, Tennessee, that it operates a chain of restaurants and retail locations known as "Cracker Barrel Old Country Stores," and that each location consists of a restaurant featuring "homestyle cooking" and a retail area. Defendant denies the remaining allegations in Paragraph 2.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3).

ANSWER:

Defendant states that Paragraph 3 calls for a legal conclusion and that Defendant is accordingly not required to answer. To the extent, however, that an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3.

4. The employment practices alleged to be unlawful were committed within the Northern District of Illinois. Venue is therefore proper under 28 U.S.C. § 1391 and 42 U.S.C. § 2000e-(5)(f)(3).

ANSWER:

Defendant admits that Plaintiff alleges that Defendant engaged in unlawful employment practices within the Northern District of Illinois, but denies that it engaged in unlawful employment practices.

Defendant states that the remaining allegations in Paragraph 4 call for a legal conclusion and that Defendant is accordingly not required to answer. To the extent, however, that an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 4.

5. Humphries has fulfilled all conditions precedent to the institution of this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. Humphries timely filed his charge of race discrimination on August 9, 2002 within 300 days of the occurrence of the last discriminatory act. He filed his complaint in federal court within 90 days of his receipt of his Notice of Right to Sue from the EEOC. Copies of the Charge and the Notice of Right to Sue are attached hereto.

ANSWER:

Defendant admits that Plaintiff filed a charge of race discrimination on August 9, 2002, and that copies of the Charge and Notice of Right to Sue are attached to the First Amended Complaint. Defendant states that the remaining allegations in Paragraph 5 call for a legal conclusion and that Defendant is accordingly not required to answer. To the extent, however, that an answer is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 5.

STATEMENT OF CLAIM

6. The Plaintiff has worked in the restaurant industry for more than 13 years. He was hired as an associate manager of the Cracker Barrel restaurant located in the Kankakee-Bradley-Bourbonnais area (hereinafter "the restaurant") in November 1998. At each restaurant, Cracker Barrel employs a General Manager who supervises several Associate General Managers. In turn, the general manager is supervised by a District Manager who has responsibility for several Cracker Barrel locations.

ANSWER:

Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that he has worked in the restaurant industry for more than 13 years. Defendant admits that Defendant hired Plaintiff in November 1998, and that Plaintiff subsequently was assigned to the position of Associate Manager at Defendant's unit #221, located in Bourbonnais, Illinois. Defendant admits that, generally, it employs a General Manager at each restaurant who supervises several Associate Managers, and its General Managers report to District Managers who have responsibility for several of Defendant's locations. Defendant denies the remaining allegations in Paragraph 6.

7. For nearly three years, Humphries performed his duties well. At the annual evaluation, conducted in November 2000, he was told that his performance was satisfactory, and he received a raise.

ANSWER:

Defendant admits that Plaintiff's rate of compensation was increased effective November 1, 2000. Defendant denies the remaining allegations in Paragraph 7.

8. In August 2001, Cracker Barrel fired the general manager of the restaurant, Donald Sessions, an African-American. Sessions had been general manager at that location since approximately 1997. A white manager, Steve Cardin, was transferred from Cracker Barrel's Tinley Park, Illinois location to serve as Acting General Manager of the restaurant. Immediately, following Cardin's arrival, nonwhite employees at the restaurant became the target of numerous disciplinary reports.

ANSWER:

Defendant admits that Donald Sessions was General Manager of unit #221 from 1997 until Defendant terminated his employment on or about July 19, 2001, and that Steve Cardin was transferred from Defendant's Tinley Park, Illinois location to serve as Acting General Manager of unit #221. On information and belief. Defendant admits that Sessions is an African-American and Cardin is white. Defendant denies the remaining allegations in Paragraph 8.

9. Cardin made it clear that he regarded it as his job to reduce the number of African-Americans employed by the restaurant. He assured the white employees that he was "there for the white

[employees]." Two of Humphries' white co-workers informed him of Cardin's comments.

ANSWER:

Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that two of his white co-workers informed him of comments allegedly made by Cardin. Defendant denies the remaining allegations in Paragraph 9.

10. On several occasions, Cardin offered his (low) opinion of Cracker Barrel's nonwhite employees. On a day when one of the restaurant's African-American cooks was absent, Cardin stated in front of several employees that the cook "must be drunk or drugged." When Cardin was asked why he thought this, Cardin replied "you know how *they* all are." Similarly, while talking to Humphries, Cardin made a disparaging reference to employee Toni Munez' "ten kids." When Humphries asked Cardin where he got the idea that Munez had a large number of children, Cardin replied, "you know how they are, those Mexicans all have a dozen kids."

ANSWER:

Defendant denies the allegations in Paragraph 10.

11. Humphries was naturally upset at being on the receiving end of racially motivated discipline, designed to reduce the number of African-American and other nonwhite employees at the restaurant. In keeping with Cracker Barrel's nondiscrimination policy, Humphries went to District Manager William

Christensen, Cardin's supervisor, at the end of August 2001, and complained to him about a verbal warning he had received since Cardin's arrival and about Cardin's remarks. Christensen wanted to know if there were any other witnesses to the racial remarks. Humphries told him that there were, but they were afraid to come forward. Christensen told Humphries not to worry about it, but did not otherwise look into the complaint or take any remedial action.

ANSWER:

Defendant admits that it had a non-discrimination policy in effect at all relevant times. Defendant denies the remaining allegations in Paragraph 11.

12. On several occasions, Christensen and former General Manager Sessions had discussed Cardin's racism. Christensen told Sessions that Cardin could never be a general manager of a Cracker Barrel restaurant or "we'd be involved in political problems all the time." Indeed, Cardin, who had earlier been employed at the Bradley location, asked for a transfer to another location when Sessions was elevated to General Manager at Bradley, because he did not want to be supervised by a black man.

ANSWER:

Defendant admits that Cardin had earlier been employed at unit #221 and asked for a transfer to another location. Defendant denies the remaining allegations in Paragraph 12.

13. Within a few days of Humphries' complaints to Christensen about the racial remarks and racially motivated discipline, he received three more written Employee Counseling Reports from Cardin, each described as "final."

ANSWER:

Defendant admits that Plaintiff received multiple written Employee Counseling Reports, including three final written warnings issued by Cardin. Defendant denies the remaining allegations in Paragraph 13.

14. On September l, 2001, Humphries received a "final" disciplinary report for allegedly using the wrong method to credit an employee's meal. The second "final" report, also issued on September 1, alleged that there was a deviation from Cracker Barrel's standard procedures for accounting. In response to this report, Humphries subsequently discovered the nature of the discrepancy and provided the information to Cardin who in turn was to contact Cracker Barrel headquarters in Lebanon, Tennessee. Despite Humphries' provision of corrected information to Cardin, the disciplinary report was not removed from Humphries' file, even after Humphries complained to Christensen about it.

ANSWER:

Defendant admits that on September 1, 2001, Plaintiff received a final written warning because he improperly used a "Gold Card" in violation of company policy to process a complimentary meal, and that Plaintiff received a second final written warning on

September 1, 2001, because of a documented deposit shortage on Plaintiff's shift. Defendant denies the remaining allegations in Paragraph 14.

15. On September 3, 2001, the third Employee Counseling Report accused Humphries of leaving the restaurant door unchained, an action which would violate Cracker Barrel's Asset Protection Policy. The report did not specify when this alleged infraction occurred, or if anyone witnessed the alleged infraction, nor did it point to any harm that befell the restaurant as a result of this alleged infraction. Humphries had not in fact left the door unchained and complained about this report to Christensen. Christensen insisted that there were witnesses to this incident but did not offer any further information.

ANSWER:

Defendant admits that Plaintiff received an Employee Counseling Report on September 3, 2001 because he left the front door of unit #221 unchained, and that Plaintiff's failure to secure the front door violated Defendant's policies, including the Asset Protection Policy. Further answering, Defendant states that the Employee Counseling Report speaks for itself and denies Plaintiff's characterization of the same. Defendant denies the remaining allegations in Paragraph 15.

16. In October, Cardin stepped down as Acting General Manager and returned to Tinley Park. Humphries was concerned that the racially motivated and retaliatory discipline he had received from Cardin would affect his annual evaluation. He expressed his

concerns to Christensen. Christensen told Humphries that he would not consider the Cardin-originated discipline when evaluating Humphries' job performance. Humphries' annual review seemed to confirm what Christensen said, since he was given a satisfactory rating for the previous year's service (including the time in which he received the Employee Counseling Reports described above), was given a raise, and was thanked for his service by Christensen himself.

ANSWER:

Defendant admits that in or about October, 2001 Cardin returned to Defendant's Tinley, Park location and that Plaintiff's rate of compensation was increased effective November 1, 2001. Answering further, Defendant states that Plaintiff's performance reviews speak for themselves, and denies Plaintiff's characterization of the same. Defendant denies the remaining allegations in Paragraph 16.

17. In late November 2001, Humphries witnessed the termination of an African-American server, Venus Green. Green was fired by one of Humphries' fellow Associate General Managers, a white man named Joe Stennett. Stennett, had been "on loan" to the restaurant from the Tinley Park Cracker Barrel location at the same time that Cardin had been temporarily transferred from Tinley Park to serve as Acting General Manager. Not only was Green's termination based on an incorrect perception of the facts, it also occurred without adherence to Cracker Barrel's established procedures for a person with her level of service - procedures that had been

accorded to white employees under similar circumstances.

ANSWER:

Defendant admits that Venus Green, a server, was discharged by Associate Manager Joe Stinnett in November 2001, and that Stinnett was temporarily transferred to unit #221 from Defendant's Tinley Park location at approximately the same time that Cardin was temporarily transferred to serve as Acting General Manager. On information and belief, Defendant admits that Stinnett is white and Green is African-American. Defendant is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that he witnessed Ms. Green's termination. Defendant denies the remaining allegations in Paragraph 17.

18. Humphries complained about what he considered a racially disparate and wrongful termination to Christensen. Christensen told Humphries disapprovingly that he was going "outside of management" for raising these concerns about Green's termination, but that Humphries should schedule a meeting with Ken Dowd, the new white General Manager of the Bradley location, and with Humphries' fellow Associate Manager, Stennett, on December 6, 2001.

ANSWER:

Defendant admits that Ken Dowd became General Manager of Defendant's unit #221 on or about November 1, 2001. On information and belief,

Defendant admits that Dowd is white. Defendant denies the remaining allegations in Paragraph 18.

19. On December 5, before the meeting could take place, Humphries was terminated. At first, he was simply told that the safe was found open on Monday morning and that his employment would be terminated. No details, violations of procedure, or counseling reports were provided at that time. When he pressed for details, approximately one week later, he was given an Employee Counseling Report which informed him that he had been terminated for leaving the safe door open several nights earlier. The Report revealed that his accuser was Stennett, the co-manager who had wrongfully terminated Green and who had been summoned to a meeting with the Plaintiff to discuss her termination. Stennett was the only witness to Humphries' alleged infraction. No loss was alleged to have occurred as a result.

ANSWER:

Defendant admits that: (1) Plaintiff's employment was terminated on December 5, 2001, (2) Plaintiff was told that the safe had been found open on the morning of December 3, 2001 and that his employment would be terminated, (3) Plaintiff was given an Employee Counseling Report, and (4) Stinnett had seen the safe open on the morning of December 3, 2001 and reported this to Defendant. Defendant states that the Employee Counseling Report speaks for itself, and denies Plaintiff's characterization of the same. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Stinnett was the only witness to Plaintiff's infraction.

Defendant denies the remaining allegations in Paragraph 19.

20. Upset at an unproven allegation to which he had been given no opportunity to respond coming so closely upon the heels of his latest discussion with Christensen about racism at the restaurant, Humphries asked Christensen for a written explanation of the reason for his termination. Christensen wrote Humphries on December 12, informing him that he was terminated, not merely for leaving the safe open on December 2, 2001, but because in September 2001, Cardin had given him a "final written warning" about leaving the store door unchained.

ANSWER:

Defendant admits that Plaintiff asked Christensen for a written explanation of the reason for Plaintiff's termination, and that Christensen wrote a letter to Plaintiff dated December 12, 2001. Defendant states that Christensen's letter speaks for itself and denies Plaintiff's characterization of the same. Defendant denies the remaining allegations in Paragraph 20.

21. As a result of the Defendant's racially discriminatory actions, Humphries experienced severe emotional distress. He suffered financial hardship because he was the sole breadwinner for his family. In addition, Cracker Barrel deemed Humphries' termination as being "for cause" within the meaning of its ERISA plans, and denied him access to profit-sharing and pension benefits to which he otherwise

would have been entitled. He still has not recovered from these losses.

ANSWER:

Defendant denies the allegations in Paragraph 21.

COUNT I
DISCRIMINATION ON THE BASIS OF RACE
IN VIOLATION OF 42 U.S.C. § 1981
AND TITLE VII

22. The plaintiff restates and incorporates by reference Paragraphs 1-21 above as part of this Count of the Complaint.

ANSWER:

Defendant restates and incorporates by reference its answers to Paragraphs 1 through 21 as its answer to Paragraph 22.

23. Cracker Barrel has discriminated against the Plaintiff with regard to discipline and termination because of race, in violation of the Civil Rights Act of 1866, 42 U.S.C. §1981, as amended, and in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended.

ANSWER:

Defendant denies the allegations in Paragraph 23.

24. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

ANSWER:

Defendant denies the allegations in Paragraph 24.

25. By reason of International's [sic] discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, and other employment benefits and, as such, is entitled to all legal and equitable remedies, available under Title VII, as amended, and section 1981, as amended, including compensatory and punitive damages.

ANSWER:

Defendant denies the allegations in Paragraph 25.

COUNT II
RETALIATION IN VIOLATION
OF SECTION 1981 AND TITLE VII

26. The plaintiff restates and incorporates by reference Paragraphs 1-25 above as part of this Count of the Complaint.

ANSWER:

Defendant restates and incorporates by reference its answers to Paragraphs 1 through 25 as its answer to Paragraph 26.

27. Cracker Barrel has retaliated against the Plaintiff with regard to discipline and termination, in violation of 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1981, as amended.

ANSWER:

Defendant denies the allegations in Paragraph 27.

28. Cracker Barrel's conduct, as described above, was intentional, deliberate, reckless, willful and conducted with disregard of the rights of Plaintiff.

ANSWER:

Defendant denies the allegations in Paragraph 28.

29. By reason of Cracker Barrel's discriminatory employment practices, the Plaintiff has experienced extreme harm, including loss of compensation, wages, back and front pay, emotional distress, anger, and other employment benefits and, as such, is entitled to all legal and equitable remedies available, under Title VII as amended and under section 1981, as amended, including compensatory and punitive damages.

ANSWER:

Defendant denies the allegations in Paragraph 29.

RESPONSE TO RELIEF REQUESTED

WHEREFORE, Defendant denies Plaintiff has sustained any damages as a result of Defendant's alleged acts or omissions, denies it is indebted to

Plaintiff in any manner whatsoever, and requests that the Court enter judgment in its favor and against Plaintiff, including awarding Defendant its costs and attorneys' fees.

DEFENDANT'S ADDITIONAL DEFENSES

FIRST ADDITIONAL DEFENSE

Plaintiff's First Amended Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

SECOND ADDITIONAL DEFENSE

Plaintiff did not bring this action within ninety days after his receipt of a Notice of Right to Sue from the Equal Employment Opportunity Commission. His claims under Title VII of the Civil Rights Act of 1964 are therefore barred by 42 U.S.C. § 2000e-5(f)(1).

THIRD ADDITIONAL DEFENSE

To the extent Plaintiff's claims under Title VII of the Civil Rights Act of 1964 were not specifically included in Plaintiff's Charge of Discrimination filed with the Equal Employment Opportunity Commission and/or Illinois Department of Human Rights, such claims are barred by Plaintiff's failure to exhaust his administrative remedies.

FOURTH ADDITIONAL DEFENSE

Plaintiff's claims under Title VII are barred to the extent that they seek relief available to Plaintiff under 42 U.S.C. § 1981.

FIFTH ADDITIONAL DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations.

SIXTH ADDITIONAL DEFENSE

On information and belief, Plaintiff has failed to mitigate any damages purportedly due him by failing to be available for work, failing to actively and earnestly search for work, and forgoing wages and benefits which he could have earned with the exercise of reasonable diligence.

SEVENTH ADDITIONAL DEFENSE

Plaintiff's First Amended Complaint does not state facts sufficient to plead willful conduct or to recover liquidated or punitive damages. All alleged actions by Defendant with respect to Plaintiff were based upon legitimate, non-discriminatory reasons and no unlawful factor motivated Defendant in any decisionmaking regarding Plaintiff's employment.

Respectfully submitted,

CBOCS WEST, INC.

By: /s/_____
One of its Attorneys

John F. Kuenstler
Beau C. Sefton
William R. Pokorny
Wildman, Harrold, Allen & Dixon LLP
225 W. Wacker Drive
Chicago, Illinois 60606-1229
Tel: (312) 201-2000
Fax: (312) 201-2555

United States District Court
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Charles P. Kocoras

CASE NUMBER	**DATE**
03 C 3765	11/1/2004

CASE TITLE Humphries vs. CBOCS West, Inc.

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

* * *

DOCKET ENTRY:

* * *

(10) ☒ [Other docket entry] **ENTER MEMORANDUM OPINION:** We grant Cracker Barrel's motion (Doc 33-1) to dismiss Humphries' claims under Title VII, with prejudice, on the basis that his Title VII claims were untimely filed. Status hearing and close of discovery set for February 22, 2005 to stand.

(11) ☒ [For further detail see order attached to the original minute order.]

✓ Docketing to mail notices.

SCT courtroom deputy's initials
Date/time received in central Clerk's Office
2004 OCT 02 AM 9:22
U.S. DISTRICT COURT

date docketed NOV 01 2004

docketing deputy initials GMA

Document Number 38

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

03 C 3765

[Filed November 1, 2004]

HEDRICK G. HUMPHRIES,	)
Plaintiff,	)
	)
vs.	)
	)
CBOCS WEST, INC.,	)
Defendant.	)
	)

MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This is an employment discrimination case brought Plaintiff, Hedrick Humphries ("Humphries"), pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981. Defendant, CBOCS West, Inc. ("Cracker Barrel"), has moved to dismiss Humphries' Title VII claims of the complaint, with prejudice, on the basis that they were untimely filed. For the reasons set forth below, the motion to dismiss is granted.

BACKGROUND

Humphries had been employed at Cracker Barrel Restaurant for three years as an associate manager.

Upon termination from Cracker Barrel, in December of 2001, he filed a two-count discrimination claim with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of race and retaliation in violation of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.* and 42 U.S.C. § 1981.

In turn the EEOC, dismissing Humphries' complaint, issued him a Notice of Right to Sue on March 3, 2003. The notice informed Humphries that if he wanted to commence a civil action, he was required to file a complaint with the court within 90 days of his receipt of the notice. Accordingly, Humphries had until June 5, 2003 to file the complaint.

On June 2, 2003, three days prior to the expiration of the 90-day statutory period, Humphries filed the lawsuit, along with a motion for the appointment of counsel and an application for leave to proceed *In Forma Pauperis* ("IFP"). On June 25, 2003, we denied Humphries' IFP application on the basis that, first, his income was above the poverty threshold level and, second, the petition lacked other pertinent information necessary to make a determination as to his financial circumstances.

Subsequently, Humphries amended the IFP application to include the missing financial information and resubmitted the request to this court on October 14, 2003. Denying the amended application on October 22, 2003, we determined that Humphries was not indigent and, therefore, was ineligible to proceed IFP.

Following the second denial, Humphries, again amended the IFP application and submitted it to this court on December 2, 2003. Upon reviewing the third request, we denied the petition and ordered him to pay the filing fee. On January 12, 2004, 195 days beyond the 90-day statutory limitations period, Humphries paid the filing fee.

The legal issue before this court is whether Humphries' complaint was timely "filed" within the meaning of 42 U.S.C. § 2000e-5(f)(1), since the filing fees were paid outside of the 90-day statute of limitations period.

DISCUSSION

Cracker Barrel contends that since Humphries paid the filing fees 184 days after the expiration of the 90-day statute of limitations period, Humphries' complaint was untimely filed under 42 U.S.C. § 2000e-5(f)(1). Thereby, pursuant to the Federal Rules of Procedure Rule 12(b)(6), defendant has moved to dismiss the complaint, "for failure to state a claim upon which relief can be granted". Fed. R. Civ. P. 12(b)(6).

In determining whether to grant a 12(b)(6) motion to dismiss, the Court will accept "the well-plead allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Hentosh v. Herman M. Finch University of Health Sciences* 167 F.3d 1170, 1173 (7th Cir. 1999). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King*

& Spalding, 467 U.S. 69, 73 (1984). "We view the facts in the complaint in the light most favorable to the non-moving party." *Hentosh,* 167 F.3d at 1173.

42 U.S.C. § 2000e-5(f)(1) requires that a plaintiff must file a civil action within 90 days of receiving the EEOC Notice of the Right to Sue. A "civil action is *commenced by* filing a complaint with the court." Fed. R. Civ. P. 3. *Emphasis added.* According to the Northern District of Illinois Local Rules, a complaint is "filed" when the complaint, accompanied with the appropriate filing fee, is submitted to the clerk. Local Rule 3.3. However, a court "may authorize the commencement . . . of any suit . . . without prepayment of fees and costs" if the plaintiff is unable to pay. 28 U.S.C. § 1915(a); *see Williams-Guise v. Board of Education of the City of Chicago,* 45 F.3d 161, 162 (7th Cir. 1995). Where the plaintiff is unable to pay the filing fee, he may submit a petition to the court to proceed IFP. If the judge approves the IFP petition, the complaint is deemed "filed" either on the date of the judge's order or on date the complaint and IFP petition was placed in custody of the clerk. Local Rule 3.3; *see Williams-Guise,* 45 F.3d 161, 162 (7th Cir. 1995); *Stephenson v. CNA Financial Corporation,* 777 F. Supp. 596, 589 (N.D. Ill. 1991); *Quiles v. O'Hare Hilton,* 572 F. Supp. 866, 867 (N.D. Ill. 1983).

However, in cases where the judge rejects an IFP petition, the complaint is not deemed "filed" until the date the filing fees are paid. *Williams-Guise,* 45 F.3d 161 at 162; *Robinson v. America's Best Contacts and Eyeglasses,* 876 F.2d 596, 597 (7th Cir. 1989). For purposes of the statute of limitations, when an IFP petition is submitted to the clerk, the court will

temporarily suspend or toll the limitations period while the court determines whether to grant or deny the IFP petition. However, the limitations period resumes running upon the date the plaintiff receives notification of the denial. *Williams-Guise v. Board of Education of the City of Chicago,* 45 F.3d 161, 162 (7th Cir. 1995); *Triplett v. Midwest Wrecking Co.,* 155 F. Supp. 2d 932, 935 (N.D. Ill. 2001); *see Jarrett v. U.S. Sprint Communications Co.,* 22 F.3d 256, 259 (10th Cir. 1994).

In the instant case, Humphries received the Notice of the Right to File on March 6, 2003. The notice provided that in order to file a civil action, Humphries must file suit within 90 days, or by June 5, 2003. Accordingly, Humphries timely submitted his complaint and his first IFP petition on June 2, 2003, three days before the expiration of the 90-day statute of limitations filing period. In a minute order, dated June 25, 2003, we denied Humphries' IFP petition.

Accordingly, the 90-day statute of limitations tolled during the processing of the petition, but resumed running upon Humphries' notification of the denial. Since the date upon which he was notified of the denial cannot be determined from Humphries' complaint, this court will include three days for service by mail pursuant to Fed. R. Civ. P. 6(e). *Truitt v. County of Wayne,* 961 F. Supp. 181, 183 (E.D. Mich. 1997). Therefore, the statute of limitations resumed running on June 28, 2003, which left Humphries three days to file his complaint before the expiration of the 90-day statutory period. In other words, Humphries had until July 1, 2003 to pay his filing fee, thereby "filing" his complaint with the court. Humphries, however, did not

pay the filing fee until January 12, 2004, 187 days after the expiration of the 90-day statute of limitations period. Therefore, Humphries' complaint was not timely "filed" in accordance with 42 U.S.C. § 2000(e)-(f)(5).

More importantly, while the court on three separate occasions denied Humphries' IFP petition, it never granted Humphries an extension of time in which to either pay the filing fee or to submit an amended IFP petition. Where the court grants a complainant an extension of time to pay the filing fee, a complaint can be held as timely even though the filing fee was paid beyond the 90-day statutory period. *See Robinson v. America's Best Contacts and Eyeglasses,* 876 F.2d 596, 598 (7th Cir. 1989) (complaint held as timely since filing fee was paid within a court approved 90-day extension of the Title VII limitations period); *Triplett v. Midwest Wrecking Company,* 155 F. Supp. 2d 932, 936 (N.D. Ill. 2001) (complaint held as timely since filing fee was paid within a court approved 10 day extension of the Title VII limitations period); *United States ex. rel. Cardenas v. Detella,* No. 97 C 3005, 1998 U.S. Dist. LEXIS 15920, at *3 (N.D. Ill. Sept. 24, 1998) (complaint held as timely since filing fee was paid within court approved 25 day extension of the habeas corpus limitations period).

Further, in absence of a court order granting an extension of time in which to pay a filing fee, a complaint can be deemed "timely" filed if the filing fee is paid within 15 days of the notification of the denial of the IFP petition. Local Rules 3.3(e); *see Chatman v. Condell Medical Center, et al.,* No. 99 C 5603, 2001

U.S. Dist. LEXIS 11369, at *13 (N.D. Ill. Aug. 2, 2001) (complaint was held timely because the filing fee was paid 10 days after notification of the IFP petition denial). Therefore, in order for Humphries to have filed a timely complaint, the filing fee had to either be paid prior to the expiration of the 90-day filing period or 15 days after notification of the first IFP petition in accordance with Local Rule 3.3(e).

It should be noted that there are exceptions to the Title VII 90-day filing requirement prescribed in 42 U.S.C. § 2000(e)-(f)(5). While the 90-day time limit is not a "jurisdictional prerequisite to filing a Title VII lawsuit, but rather, is more akin to a statute of limitations and subject to waiver, estoppel, and equitable tolling under appropriate circumstances." *Hentosh v. Herman M. Finch University of Health Sciences,* 167 F.3d 1170, 1174 (7th Cir. 1999); *see Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982).

One exception is the doctrine of equitable estoppel, sometimes referred to as fraudulent concealment. Under this doctrine, a limitations period is suspended when "defendant takes active steps to prevent the plaintiff from suing in time, such as by hiding evidence or promising not to plead the statue of limitations." *Hentosh,* 167 F.3d at 1174. Since Humphries' complaint neither alleges nor provides a basis to infer that defendant purposely hindered Humphries' ability to file a timely complaint, equitable estoppel is not applicable in this case.

A second exception is equitable tolling. This doctrine permits a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, he is

unable to obtain vital information bearing on the existence of his claim. *Id.* at 1174. "Equitable tolling should be exercised only sparingly and not in cases where claimant failed to exercise his due diligence in preserving his legal rights." *Knight v. City of Milwaukee,* No. 98-2510, 1998 WL 846857, at *2 (7th Cir. Nov. 25, 1998). Similarly, Humphries' complaint neither alleges nor provides a basis to infer that his untimely filling of his complaint was due to his inability to obtain information that was essential to establishing his claim. Therefore, the doctrine of equitable tolling cannot be applied in this case to bar the 90-day statute of limitations requirement.

Humphries asserts that in the Seventh Circuit, once the court denies an IFP petition, the complainant has a "reasonable" amount of time in which to pay the filing fee. Relying on *Williams-Guice v. Board of Education,* 45 F.3d 161 (7th Cir. 1995), Humphries contends that his Title VII complaint should not be dismissed as untimely because the fee was paid within a reasonable time after the *third* IFP petition was denied. The fact that Humphries paid the filing fee 35 days after the date of the third IFP petition denial is irrelevant. While reasonableness may be a factor into the inquiry as to whether a complaint that has been filed outside of the 90-day statute of limitation period is timely, the Seventh Circuit has not established reasonableness as the controlling standard of analysis.

In *Williams-Guice,* the Court discussed a hypothetical fact pattern that is similar to this case and raised the very question on which this case turns: "What happens when the plaintiff lodges the complaint and application to proceed IFP with two days to go [on

the statute of limitations clock and does not learn about the judge's order denying the complaint until the time has run?" *Id.* at 165. However, the *Williams-Guice* Court left this question unanswered and instead, gave two potential solutions, one being that the "time remains in suspension for a *"reasonable* time". *Id. Emphasis added.* Since *Williams-Guice, the* Seventh Circuit has yet to resolve this issue. Additionally, since the issue in *Williams-Guise* involved the timeliness of service of process and not the timeliness of the filing of a complaint, the discussion of a possible "reasonableness test" is dicta, and, therefore, not controlling. Thus, Humphries' assertion that the complaint was timely filed because the filing fee was paid within a "reasonable" amount of time after the third denial of the IFP petition is misguided.

Even if this court was persuaded to use a "reasonableness test" to determine whether Humphries had timely filed his complaint, he would not have satisfied that standard. The court denied the first IFP petition on June 25, 2003. Even allowing three days for mail service, Humphries was notified of the denial on June 28, 2003 and yet did not submit an amended IFP petition until October 14, 2003, 118 days after notification of the denial. Moreover, we denied the second IFP petition on October 22, 2003. Again, allowing three days for mail service, Humphries was notified of the denial on October 25, 2003 but did not submit the third petition until December 2, 2003, 38 days later after notification of the denial. Finally, we denied the third petition on December 8, 2003 and the filing fee was paid on January 14, 2004. Adding three days for mail service, the fees were not paid until 32

days after notification of the denial of the third petition. Taking into account three days for mail service and the three days that were remaining on the statute of limitations clock when Humphries received notification of the denial of the first IFP petition, he had until July 1, 2003, the end of the limitations period, to file a timely complaint.

Therefore, Humphries did not pay the filing fee until 195 days after the expiration of the 90-day statute of limitations period. Accepting the 195 days as reasonable would be inconsistent with the rationale for the 90-day statute of limitations for Title VII discrimination cases.

Congress has expressed the limitations bar not in months or years, but in days. It requires . . . the court complaint to be filed within 90 days after the receipt of the EEOC "right to sue" letter. 42 U.S.C. § 2000e-5(e)(1). Implicit in this legislation is a policy that there should be no delay in employment discrimination cases. It is a recognition that memories may fail in the workplace in recalling the minutia of what is said and what was done. It therefore becomes necessary to hear testimony while precise recollections are keen and are not dulled by undue passage of time. *Sanders v. Venture Stores, Inc.* 56 F.3d 771, 775 (7th Cir. 1995). Therefore, it is clear that the time period of 195 days greatly undermines the purpose of the statute of limitation guidelines.

CONCLUSION

For the foregoing reasons we grant Cracker Barrel's motion to dismiss Humphries' claims under Title VII,

with prejudice, on the basis that his Title VII claims were untimely filed.

/s/
Charles P. Kocoras
Chief Judge
United States District Court

Dated: NOV 1 2004

JA 93

Exhibit P to LOCAL RULE 56.1
Statement of Material Facts by Plaintiff

Docket Entry 53, filed 6/28/05
Bates Numbers CB00460 - CB00473

[see Fold-out Exhibit, CB000460-CB00465]

balance of document begins at JA 94

Open Door Policy

CONFIDENTIAL

Open-Door Report - FOR COMPANY USE ONLY - pub. 081799



pleasing people

Employee Open-Door Report

Date of Report:		Date Resolved:	
Follow-Up Date (if required):			
Follow-Up completed by:			
	Manager Name		Manager Signature
Incident Closed Date:		Closed by:	
			Manager Signature

General Instructions & Guidelines for Reporting Manager

1.	This form is to be completed by a member of the store management team or District Manager.
2.	This form must be completed within 10 days of report of the incident.
3.	All information must be completed and appropriate signatures gathered.
4.	An incident report should be completed for any situation brought to your attention regarding discrimination or harassment of any kind. Review the policies on the back of this form. Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race, color, religion, gender, national origin, marital status, or any medical condition or disability.

CB00460

http://notes1/operations/manuals/ops.../5e56b875883?a9bf8625609be005e6226?OpenDocumen... 8/13/01

BEST AVAILABLE COPY

5.	Use the standard forms provided to gather employee statements. Make sure you have any witnesses to the incident complete a statement. Should you require them, you can make additional copies of the blank Employee Statement Form. The employee is to complete, sign and date the report. Should the employee request you to complete the form for them, you must sign the "Prepared By" section of the form and you must have the employee sign and date the form.
6.	Incident conclusion with proposed remedial action and follow-up dates must be completed.
7.	Any counseling action taken as a result of this incident requires that you complete a Employee Counseling Report. Remember that the employee is to receive a copy of the Employee Counseling Report only.
8.	It is important that you remind employees that have brought an incident to your attention that they will not be retaliated against, and that their statements will be kept as confidential as necessary to the investigation.
9.	A copy of Cracker Barrel's policies on Equal Employment Opportunities, Open-Door, and Harassment should be reviewed with each employee involved in this incident. Copies of these policies have been provided with a receipt for employees to sign. Attach the signed receipt to this report.
10.	You must submit this form via Inter-Office Mail to the Employee Relations department at the Home Office where it will be reviewed by your Employee Relations Specialist . If you have any questions or concerns in completing any of these forms or conducting the investigation, please call your Employee Relations Specialist at the Home Office.

Cracker Barrel Old Country Store, Inc.
Confidential Employee Statement Form

Store No:		Today's Date:		
Employee Name:		Employee Social Security Number:		
Employee Position:		Employee PAR Level:		
Incident Date:		(to the best of your knowledge)		
In your own words, please describe the incident including specific dates and times (attach additional page if necessary):				

Were there any witnesses to this incident? If so, who?			CONFIDENTIAL	
	Statements will be kept as confidential as necessary to the investigation			
Signed:				
	Employee Signature		Date	
Prepared by:				
	Print Name		Date	
Preparer's Signature:				
For Management Use Only				
Reported to District Manager	Date:		Reported to Home Office Date:	
For Home Office Use Only				
Date Received:		Reviewed by:		
			Employee Relations Dept.	Cracker Barrel Old Country Store, Inc.

Declaración Confidencial del Empleado

Número de tienda:		Fecha:		
Nombre de empleado:		Número de Social Security:		
Puesto de empleado:		PAR Nivel de empleado:		
Fecha de incidente:		(según mi leal saber y entender)		

CB00462

Por favor describa en sus propias palabras, el incidente incluyendo fechas y horarios. Use más páginas si se necesita. ¿Hubo testigos de este incidente? ¿Si hubo, quien?			CONFIDENTIAL	
	Esta declaración se mantendra tan confidencial como sea posible durante la investigación.			
Firma del empleado:				
	Firma del empleado		Fecha	
Prepared by:				
	Print Name		Date Prepared	
Preparer's Signature:				
For Management Use Only				
Reported to District Manager	Date:		Reported to Home Office Date:	
For Home Office Use Only				
Date Received:		Reviewed by:		

CB00463

CONFIDENTIAL

			Employee Relations Dept.	

Incident Information

To be completed by management.

Store No.:			Today's Date:	
Completed By:				
	Print Name		Signature	
Incident Reported By:				
	Name		Position	PAR Level
Date of Incident:			Time of Incident:	Date Incident Reported:
Describe place where incident happened:				
Describe the details of the incident including specific dates and times:				
Parties involved:	Name	Position	PAR Level	
Witnesses to the incident:				
	Name	Position	PAR Level	
List any person (s) that were told of the incident, including Managers:				
	Name	Position	Date Informed of Incident	

CB00464

Incident Resolution CONFIDENTIAL

For each person involved in the incident, list action taken with each.
For counseling, a separate Counseling Report must also be completed.

Name	Date Action Taken:	Action:
	____/____/____	Policy Review Counseled/Verbal Warning Counseled/Written Warning Counseled/Final Written Warning Suspension during investigation From:_____ To: _____ Termination Effective:_____
Comments and/ Follow-Up Action to take place:		
Manager Signature:		Date:
Name	Date Action Taken:	Action:
	____/____/____	Policy Review Counseled/Verbal Warning Counseled/Written Warning Counseled/Final Written Warning Suspension during investigation From:_____ To: _____ Termination Effective:_____
Comments and/or Follow-Up Action to take place:		
Manager Signature:		Date:
Name	Date Action Taken:	Action:
	____/____/____	Policy Review Counseled/Verbal Warning Counseled/Written Warning Counseled/Final Written Warning Suspension during investigation From:_____ To: _____ Termination Effective:_____
Comments and/or Follow-Up Action to take place:		
Manager Signature:		Date:

CB00465

☐ Contact has been made to the proper authorities (including Police if appropriate).

[CB00466]

CONFIDENTIAL

Describe:

_____

☐ District Manager contacted DM Name:_____

Date:_____

Contacted by (print name):_____

Date:_____

☐ Home Office contacted Name:_____

Contacted by (print name):_____

[LOGO]

Equal Employment Opportunity Statement

Employment opportunities at Cracker Barrel are open to all qualified applicants solely on the basis of their experience, aptitude, and abilities. Qualified applicants are considered for all positions and for advancement without regard to race, color, religion, sex, national origin, age, marital status, or the presence of a disability, in accordance with federal law. Cracker Barrel also complies with State and local law regarding equal employment opportunity. Advancement is based on an individual's achievement, performance, ability, attitude, and potential for promotion.

Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race, color, religion, sex, national origin, marital status, or any medical condition or disability.

- Employees who believe they have been subjected to unlawful discrimination, harassment or retaliation must immediately advise their Manager, Supervisor or the Employee Relations department toll free at (888) 648-3667.
- If appropriate or necessary, an investigation will be conducted and confirmed cases of discrimination and/or harassment will be subject to discipline, up to and including, termination.
- The results of an investigation will be communicated to the employee who has made the claims of discrimination. The employee will be notified that an investigation has occurred and the appropriate action has been taken. This will be done either verbally or in writing.
- All confirmed cases of discrimination will be promptly remedied and the offender appropriately disciplined.

[CB00467]

- Employees can and will sometimes provide notice of harassment or discrimination to someone other than their immediate supervisor. These instances should also be addressed immediately. While the above policy primarily addresses hiring of qualified applicants, it should also apply to all personnel decisions. Our Equal Opportunity statement should extend to promotions, developmental opportunities, transfers, disciplinary actions, etc.

Harassment Policy

Cracker Barrel Old Country Store, Inc. does not tolerate harassment in any form. The company values and respects all employees.

- All employees are responsible for ensuring the workplace is free from harassment.
- Inappropriate or offensive behavior, actions, words, jokes, or comments based on an individual's sex, race, ethnicity, age, disability, religion, or any other legally protected characteristic will not be tolerated and may constitute harassment.
- Cracker Barrel will take affirmative steps to end any such conduct.
- Employees must avoid any action or conduct which could be viewed as harassment, including but not limited to:
- Sexual touching, advances or propositions.
- Verbal abuse of a sexual or racial nature.
- Graphic or suggestive comments about an individual's dress or body.
- Sexually or racially degrading words to describe an individual.
- Display in the workplace of sexually suggestive or racially offensive objects or pictures.
- Sexually or racially offensive jokes.
- All complaints of harassment at work by anyone, including managers, co-workers, or guests, must be reported to the manager or supervisor or to the Employee Relations department toll free at (888) 648-3667.
- All complaints will be investigated in a timely manner and kept strictly confidential.
- Confirmed cases of harassment will be regarded as gross misconduct and appropriate disciplinary action will be taken.

Discipline that puts an end to the harassing behavior is appropriate. Some circumstances may warrant termination. In other instances, counseling may be appropriate. Please contact the Employee Relations department for assistance.

Open Door Policy:

Employees are encouraged to go to their manager or supervisor with any questions or suggestions, or to review any problems or decisions affecting their jobs. The manager or supervisor is the employee's first link to the rest of the company.

- The Cracker Barrel manager or supervisor is responsible for the employee and wants him or her to do well, and so is interested in his or her welfare, work, working conditions, and satisfaction as an employee of Cracker Barrel.
- Supervisors and department heads are responsible for creating and maintaining a positive, productive working environment free from harassment and discrimination.
- Any employee who believes he or she is the victim of discrimination, harassment, or retaliation must report this behavior to their manager immediately.
- If the employee believes the situation has not been resolved or if he or she just cannot talk about it with his or her manager, it is appropriate to speak with the manager's direct supervisor.
- If the employee believes the problem or concern has still not been resolved, write or call the Employee Relations department toll free at (888) 648-3667.
- The employee will not get into trouble or be retaliated against by using this policy in good faith.

- It is everyone's responsibility to help maintain good working relationships to continue to communicate until the problem is finally resolved.
- Cracker Barrel pleases its employees by supporting them as they strive for success and by listening to their concerns and ideas.

[CB00468]

- Cracker Barrel relies on managers and supervisors to do this as part of their jobs. For this reason, it is mandatory for the manager or supervisor to investigate any allegations of inappropriate behavior immediately.
- The Employee Relations department is available to assist with any questions or concerns that arise from such a situation.

[LOGO]

Equal Employment Opportunity Statement

Employment opportunities at Cracker Barrel are open to all qualified applicants solely on the basis of their experience, aptitude, and abilities. Qualified applicants are considered for all positions and for advancement without regard to race, color, religion, sex, national origin, age, marital status, or the presence of a disability, in accordance with federal law. Cracker Barrel also complies with State and local law regarding equal employment opportunity. Advancement is based on an individual's achievement, performance, ability, attitude, and potential for promotion.

Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its

employees due to race, color, religion, sex, national origin, marital status, or any medical condition or disability. Employees who believe they have been subjected to unlawful discrimination, harassment or retaliation must immediately advise their Manager, Supervisor or the Employee Relations department toll free at (888) 648-3667.

Harassment Policy

Cracker Barrel Old Country Store, Inc. does not tolerate harassment in any form. The company values and respects all employees. All employees are responsible for ensuring the workplace is free from harassment. Inappropriate or offensive behavior, actions, words, jokes, or comments based on an individual's sex, race, ethnicity, age, disability, religion, or any other legally protected characteristic will not be tolerated and may constitute harassment. Cracker Barrel will take affirmative steps to end any such conduct.

Employees must avoid any action or conduct which could be viewed as harassment, including but not limited to:

- Sexual touching, advances or propositions.
- Verbal abuse of a sexual or racial nature.
- Graphic or suggestive comments about an individual's dress or body.
- Sexually or racially degrading words to describe an individual.
- Display in the workplace of sexually suggestive or racially offensive objects or pictures.

[CB00469]

- Sexually or racially offensive jokes.

All complaints of harassment at work by anyone, including managers, co-workers, or guests, must be reported to the manager or supervisor or to the Employee Relations department toll free at (888) 648-3667. All complaints will be investigated in a timely manner and kept strictly confidential. Confirmed cases of harassment will be regarded as gross misconduct and appropriate disciplinary action will be taken.

Open Door Policy:

As an employee of Cracker Barrel Old Country Store, Inc. you belong to an important group of people. Cracker Barrel pleases its employees by supporting them as they strive for success and by listening to their concerns and ideas. Cracker Barrel relies on store managers to do this as part of their jobs.

Your manager is responsible for your training. He or she wants you to do well, and is interested in your welfare, your work, your working conditions, and your satisfaction as an employee of Cracker Barrel. We encourage you to go to your manager with any questions or suggestions, or to review any problems or decisions affecting your job. Your manager is your first link to the rest of the company. If you then believe the situation has not been resolved or if you just can't talk about it with your manager, write or call your District Manager. If you believe your problem or concern has still not been resolved write or call the Employee Relations Department toll free at (888) 648-3667.

Please know that you won't be retaliated against by using this policy in good faith. Cracker Barrel always tries to have a good working atmosphere. Of course, there will be occasions when problems need to be discussed so that solutions can be reached. It is everyone's responsibility to help maintain good

working relationships and to continue to communicate until the problem is finally resolved.

Manager: 1. Review policies with employee. 2. Have employee sign statement below. 3. Tear off the signature portion to be attached to incident report. 4. Hand employee upper portion with policy statements for their own records.
By signing this statement I verify that I have reviewed with my manager and received a copy of Cracker Barrel Old Country Store's Equal Employment Opportunity Statement, Harassment Policy and Open Door Policy. Employee Signature:_____ Today's Date:_____

[LOGO]

[CB00470]

Declaración de la igualdad en el empleo

Las oportunidades de empleo en Cracker Barrel Old Country Store están abiertas a todos los aspirantes cualificados sólo basados en su experiencia, aptitud, y capacidades.

Los aspirantes cualificados (los empleados actuales y los empleados futuros del Cracker Barrel) se consideran para todas las posiciones y para el adelanto sin ninguna consideración hacia la raza, el color, la

religión, el sexo, el origen nacional, la edad, el estado civil, o la presencia de una incapacidad, de acuerdo con la ley federal.
Cracker Barrel también acata las leyes locales y del estado con respecto a la igualdad de oportunidades en el empleo.
El adelanto se basa enteramente en el logro, el funcionamiento, la capacidad, la actitud y el potencial de un individuo para la promoción.
Cracker Barrel no tolerará ninguna forma de discriminación o de hostigamiento de sus empleados debido a la raza, al color, a la religión, al sexo, al origen nacional, a la edad, al estado civil, o a ninguna condición o incapacidad médica.
Cualquier empleado que se crea víctima de la discriminación ilegal, el hostigamiento, o la represalia debe avisar inmediatamente a su gerente, el gerente de distrito, al Supervisor, o el Departamento de las Relaciones del Empleado en la Oficina Principal (888) 648-3667.

Política del hostigamiento
Cracker Barrel Old Country Store no tolera el hostigamiento en ninguna forma.
Valoramos y respetamos a todos nuestros empleados, y todos los empleados son responsables de asegurar que el lugar de trabajo esté libre del hostigamiento.
El comportamiento, las acciones, las palabras, las bromas, o los comentarios no apropiados u ofensivos, basados en el sexo de un individuo, la raza, la pertenencia étnica, la edad, la incapacidad, la religión, u otra característica legalmente protegida, no serán tolerados y pueden ser constituidos como el hostigamiento.

Sea consciente de que el Cracker Barrel tomará medidas afirmativas para acabar tal conducta.
Usted debe evitar cualquier acción o conducta que se podría ver como hostigamiento, incluyendo pero no limitado a:

- Tacto, avances o asuntos sexuales.
- Abuso verbal de una manera sexual o racial.
- Comentarios gráficos o sugestivos sobre la ropa o el cuerpo de un individuo.
- El uso de palabras sexuales o raciales degradantes al describir negativamente a un individuo.
- Exhibir en el lugar de empleo cualesquiera objetos o cuadros sexualmente sugestivos o racialmente ofensivos.
- Bromas sexualmente o racialmente ofensivas.

Si usted tiene una queja del hostigamiento en el trabajo contra cualquier persona, incluyendo gerentes, de los compañeros de trabajo o de los clientes, usted debe reportar la queja. Reporte su queja a su gerente o al departamento de Relaciones del Empleado (888) 648-3667. Todas las quejas serán investigadas de una manera oportuna y mantenidas estrictamente confidenciales.
Los casos confirmados de hostigamiento serán considerados como mala conducta grave y se tomará la acción disciplinaria apropiada.

<u>La politica "puerta abierta"</u>
Como empleado de Cracker Barrel Old Country Store, usted pertenece a un grupo de gente importante. El Cracker Barrel complace a sus empleados por apoyarlos mientras que se esfuerzan

[CB00471]

por el éxito y por escuchar sus preocupaciones e ideas. El Cracker Barrel depende de sus gerentes para hacer esto como parte de su trabajo.

Su gerente es responsable para su entrenamiento. Él o ella quiere que usted prospere y está interesado en su bienestar, su trabajo, sus condiciones de trabajo, y su satisfacción como empleado del Cracker Barrel. Le exhortamos que vaya a su gerente con cualquiera pregunta o sugerencia, o para repasar cualquier problema o decisión que afecte su trabajo.

Su gerente es su primera conexión al resto de la compañía. Entonces si usted cree que la situación no se haya resuelto o si usted no pueda discutirla con su gerente, es apropiado para hablar con el supervisor directo de su gerente (etcétera).

Si usted cree que su problema o preocupación todavía no se haya resuelto, escribe o llame al Departamento de Las Relaciones del Empleado (888) 648-3667.

Queremos que sepa que no sufrirá ningún problema usando esta política en la buena fe.

Cracker Barrel siempre intenta tener un buen ambiente de empleo. Por supuesto, habrá ocasiones cuando los problemas necesitan ser discutidos para poder alcanzar soluciones. Es la responsabilidad de cada persona de ayudar a mantener buenas relaciones en el trabajo y a seguir comunicándose hasta que el problema finalmente se resuelva.

Manager: 1. Review policies with employee. 2. Have employee sign statement below. 3. Tear off the signature portion to be attached to incident report. 4. Hand employee upper portion with policy statements for their own records.
Certifico que he repasado con mi gerente y recibido una copia de la póliza de Cracker Barrel Old Country Store sobre la Igualdad de Oportunidades en el Empleo, el Hostigamiento, y la "Puerta Abierta". Firma del empleado:_____ Fecha:_____

[LOGO]

EMPLOYEE OPEN DOOR REPORT

INVESTIGATION LOG

To be completed by each investigating Manager

[CB00472]

This report is different from the Incident Information form, and must be completed with every Open Door Report. It is intended to assist every Manager in the investigation process and keep an accurate account of the steps taken during the process. Review the General Instructions and Guidelines whenever completing an Open Door Report.

Example:

Date and time:	*Who you spoke with and What action was taken:*
1/5/01 10:30 A.M.	Spoke with Jane Doe; got written statement will speak with John Doe on 2nd shift.
1/5/01 3:00 p.m.	Spoke with John — see statement; he denied called Empl. Relations; spoke with ER Specialist, who advised that John be discharged.
1/6/01 2:10 p.m.	John discharged; see counseling

✓ As the investigating Manager, you must provide the specific date and time of every event during the investigation.

✓ You must provide the name of the witness [the who] and the action taken [the what].

✓ You must get a written statement from every employee you speak with at the time that you speak with them. Not Later. That includes the accuser and the accused.

✓ Act promptly. You may need to separate the accused and accuser by changing schedules, or suspending the accused pending the outcome of the investigation.

✓ Contact your District Manager and the Employee Relations for assistance.

Cracker Barrel Old Country Store, Inc.
INVESTIGATION LOG
To be completed by each investigating Manager

Store No.:		
Completed By:		

Date and Time	Who you spoke with and What action taken:

[CB00473]

File Attachment:

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION**

No. 03 C 3765

[Filed October 6, 2005]

HEDRICK G. HUMPHRIES,	)
Plaintiff,	)
	)
vs.	)
	)
CBOCS WEST, INC.,	)
Defendant.	)
	)

MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This matter comes before the court on the motion of Defendant CBOCS West, Inc. ("Cracker Barrel"), for summary judgment and the motion of Plaintiff Hedrick Humphries to strike the declaration of Kimberly Tramel. For the reasons set forth below, the motion for summary judgment is granted and the motion to strike is denied as moot.

BACKGROUND

Humphries is a former employee of Cracker Barrel at its restaurant and retail store in Bradley, Illinois. He is African-American. During the three years that Humphries worked for Cracker Barrel, he was never

demoted, nor was his pay ever reduced. He was promoted at least once. Over the last eight months of his employment, Humphries received nine written or verbal warnings with respect to his work performance that were memorialized in written Employee Counseling Reports, or "ECRs." Twice these ECRs informed Humphries that potential disciplinary action included termination. The three penultimate ECRs, issued in early September 2001, stated that they were a "final" warning.

In late November 2001, Humphries informed William Christensen, the district manager for the Bradley restaurant and store, that he felt he and another African-American employee named Venis Green were being treated in a discriminatory manner because of their race.

On the morning of December 3, Joe Stinnett, another associate manager, reported finding the store safe unlocked and slightly open. Cracker Barrel policy requires that an associate manager who closes a store in the evening is responsible for making sure that the store safe is closed and locked before leaving for the night. Humphries was the associate manager on duty the night of December 2. His employment was terminated on December 5. According to Cracker Barrel, this termination occurred because Humphries was on duty the night before the safe was found open; according to Humphries, the termination was the result of Cracker Barrel's desire to retaliate against him for his November comments to Christensen.

Our prior opinions detailed the procedural morass that ensued after Humphries' termination. It is

sufficient to note that, as the case now stands, the only cause of action asserted is founded in 42 U.S.C. § 1981. According to Humphries, Cracker Barrel interfered with his rights to make and enforce contracts to the same extent enjoyed by white citizens. Cracker Barrel moves for summary judgment in its favor on his claims.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial. *Id.* The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence. *Id.* The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000);

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

DISCUSSION

Though Humphries originally sued under both Title VII and 42 U.S.C. § 1981, we dismissed the Title VII claims on November 1, 2004. Thus, the motion and this opinion focus solely on Humphries' § 1981 claim.[1]

To avoid summary judgment of a § 1981 claim arising from an employment relationship, an employee must show that he or she undertook the statutorily protected action of making or enforcing a contract, an action by the employer that worked to the detriment of the employee, and a causal connection flowing from the former to the latter. *See Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 301 (7th Cir. 2004). The third element can be established either directly or indirectly. *See Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 783 (7th Cir. 2004). The direct method allows a trier of fact to find discriminatory

---

[1] The parties do not address the issue of whether § 1981 applies to termination of an at-will employment relationship. *In Gonzalez v. Ingersoll Mill. Mach. Co.*, the Seventh Circuit opined in dicta that it does not. 133 F.3d 1025, 1035 (7th Cir. 1998). Although the court has not since passed on the question definitively, the text of § 1981, which specifically refers to termination as being within its scope, and at least one subsequent opinion make the continued vitality of *Gonzalez* on this point questionable. *See Walker v. Abbott Laboratories*, 340 F.3d 471, 477-78 (7th Cir. 2003). However, since Cracker Barrel has not pressed this point, we will proceed using the assumption that § 1981 can apply to the situation in this case.

conduct without inference or presumption. *See id.* The evidence necessary to allow a plaintiff to employ the direct method can consist of either an employer's admission that the challenged action was the product of unlawful discrimination or a combination of events that directly indicates that discrimination was afoot. *See id.* Humphries contends that he can proceed under this method under the second route. He asserts that the combination of the short period of time that elapsed between the time that he complained about Cracker Barrel's treatment of Green and him and Cracker Barrel's inaction with respect to his complaints thereafter directly establish a discriminatory motive. Despite Humphries' arguments, this is far from the "convincing mosaic" necessary to point directly to unlawful motivations behind Cracker Barrel's action. *Troupe v. May Dep't. Stores*, 20 F.3d 734, 737 (7th Cir. 1994). At best, this evidence describes a few actions concentrated at the time of termination, not the abrupt about-face or pervasive pattern held sufficient in other cases. *See Lang v. Ill. Dep't of Child and Family Servs.*, 361 F.3d 416, 419-21 (7th Cir. 2003); *Sitar v. Indiana Dep't of Transportation*, 344 F.3d 720, 728-29 (7th Cir. 2003).

The second manner by which discrimination can be shown, the indirect method, consists of a three-step process. *See Gonzalez v. Ingersoll Mill. Mach. Co.*, 133 F.3d 1025, 1032 (7th Cir. 1998). First, the plaintiff must demonstrate a prima facie case for discrimination. *Id.* To make out his prima facie case, Humphries must show that he is a member of a racial minority, that he was meeting Cracker Barrel's legitimate expectations with respect to his job duties, that he suffered an adverse action, and that similarly

situated white employees were treated more favorably than he. *See id.* at 1032, 1035. If Humphries can demonstrate each of these elements, a presumption of unlawful discrimination arises, which Cracker Barrel must counter with a lawful reason for Humphries' termination. *Id.* at 1032. If Cracker Barrel does so, Humphries must then show that the proffered reason is actually a pretext for discrimination. *Id.*

Cracker Barrel challenges Humphries' showing on the second and fourth elements of his prima facie case. With respect to the second, whether Humphries was performing satisfactorily, the parties' arguments clearly indicate that material issues of fact exist. The fourth, however, clearly falls in Cracker Barrel's favor.

Humphries contends that Ken Dowd and Joseph Stinnett, who are both white and who held supervisory positions, provide the necessary points of comparison. According to Humphries, both of these employees were cited for not meeting Cracker Barrel's standards with respect to safeguarding money and other assets of the company. To be similarly situated, two employees must have the same supervisor, engage in the same conduct, have the same qualifications, and have no legitimately differentiating characteristics that would account for an employer's differing treatment. *See Ineichen v. Ameritech*, 410 F.3d 956, 960-61 (7th Cir. 2005). Humphries contends that Dowd and Stinnett engaged in conduct similar to that for which he was terminated, but they kept their jobs. However, he provides no other information about them that would be germane to the inquiry. In other words, he provides evidence that Dowd and Stinnett are comparable to him in one material respect, but by no means in all

material respects. *See Sartor v. Spherion Corp.*, 388 F.3d 275, 279 (7th Cir. 2004). The latter is required to stave off summary judgment. Because Humphries has not offered any employees whom we can determine to be truly similar to him, we have no way to gauge whether Cracker Barrel behaved in a racially discriminatory manner. Because Humphries has not shown each element of his prima facie case, he cannot prevail through the indirect method.

Even if Humphries had offered a similarly situated employee, Cracker Barrel would still be entitled to summary judgment. Viewing the situation from Cracker Barrel's perspective at the time Humphries was fired, there is nothing suspicious about their belief that a violation of their employment policy occurred when the safe was not closed and locked when the store opened on December 3, 2001. *See Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000). Because Humphries was the manager on duty the night before, it was his responsibility to make sure that the safe was closed and locked. There is nothing unlawful about an employer terminating an employee who fails to safeguard money and other valuables belonging to the employer.

Humphries counters that this reason is a lie; he supports his belief by stating that the safe was locked and closed when he left on the night of December 2. Even if we assume this is true, it does nothing more than show that Cracker Barrel's belief that Humphries had neglected to perform an important duty was incorrect, not that they did not truly hold the belief. That may show that Cracker Barrel made a mistake, but it is not pretext that would allow Humphries to

overcome the legitimate business reason Cracker Barrel has proffered for terminating his employment. *See id.* Consequently, Cracker Barrel is entitled to summary judgment on Humphries' retaliation claim.

B. Racial Discrimination

Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the presentation he makes in his opposition papers that only the retaliation claim has any vitality. This is especially true given that his response to Cracker Barrel's claimed entitlement to summary judgment on the discrimination claim consists of a single paragraph that in essence contends that his arguments with respect to the retaliation claim apply directly to his discrimination claim and defeat Cracker Barrel's motion.

This presentation does not carry the day for two reasons. First, undeveloped arguments result in waiver of the positions that otherwise might be permissible. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). Second, as described above, Humphries' retaliation claim fails as a matter of law. If the same arguments are to apply to his discrimination claim, then it must meet a like fate.

C. Motion to Strike Declaration of Kimberly Tramel

In connection with his response to the motion for summary judgment, Humphries moved to strike the declaration of Kimberly Tramel, who identifies herself

only as an employee of Cracker Barrel. Because the assertions contained within the declaration played no part in our decision and in light of the outcome of the motion for summary judgment, the motion to strike is denied as moot.

CONCLUSION

Based on the foregoing, Cracker Barrel's motion for summary judgment is granted. Humphries' motion to strike the declaration of Kimberly Tramel is denied as moot.

/s/
Charles P. Kocoras
Chief Judge
United States District Court

Dated: October 6, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-4047

[Filed February 6, 2007]

HEDRICK G. HUMPHRIES, *Plaintiff-Appellant*,

v.

CBOCS WEST, INC., *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03-C-3765 – Charles P. Kocoras, *Judge*.

Argued March 28, 2006 - Decided January 10, 1007

Before EASTERBROOK, *Chief Judge*, and POSNER and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Hedrick Humphries filed a suit alleging claims of discrimination and retaliation under Title VII and 42 U.S.C. § 1981 against CBOCS West, Inc., based upon his discharge as an associate manager at one of defendant's Cracker Barrel restaurants. After dismissing Humphries's Title VII claims as procedurally barred, the district court granted summary judgment in favor of CBOCS West, Inc. (hereinafter "Cracker Barrel"), holding that

Humphries could not establish his prima facie burden of showing that a similarly situated individual in a non-protected class was treated more favorably. We reverse the district court's grant of summary judgment as to Humphries's retaliation claim because Humphries made a sufficient showing under the indirect method to establish a prima facie case of retaliation under section 1981. We affirm the judgment as to Humphries's discrimination claim because Humphries forfeited this claim by failing to present an adequate argument before the district court.

I. BACKGROUND

The following facts are recounted in the light most favorable to Humphries, the non-movant. Humphries, an African-American male, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Associate managers at Cracker Barrel are supervised by a general manager, who in turn is supervised by a district manager. In this case, three general managers cycled through during Humphries's three-year tenure: Don Sessions, Steve Cardin and Ken Dowd. His performance during his first two-and-a-half years (roughly February 1999 through mid-July 2001) was generally excellent. For instance, he received annual merit raises and bonuses, and his supervisor (Sessions) testified that he considered Humphries to be his best associate manager. Circumstances changed for Humphries when Cardin took over (as a temporary replacement) for Sessions. According to Humphries, Cardin routinely made racially derogatory remarks, such as stating that all African-Americans are "drunk or high on drugs" or that "all Mexicans have a bunch

of kids." Humphries alleges that other employees confirmed Cardin's inappropriate comments, and told Humphries that Cardin had stated that he was there "for the white people" and was "going to take care of the white people."

Within Cardin's initial month of being the general manager, he issued Humphries five disciplinary reports, called Employee Counseling Reports (ECRs). The ECRs covered a wide range of alleged misconduct, including bank deposit shortages and inappropriate use of Gold Cards to provide complaining customers a free meal. Humphries claims that the ECRs were groundless and reflected Cardin's racial animus. In response, in August or September 2001, Humphries complained to Cardin's supervisor, district manager William Christensen. Christensen, however, appears not to have conducted any investigation of Humphries's claims, contrary to Cracker Barrel policies.

In September 2001, Ken Dowd became general manager (Cardin returned, as planned, to his store). Shortly thereafter, Joe Stinnett, one of Humphries's fellow associate managers, fired an African-American food server, Venis Green, because she purportedly failed to show up for a shift. Humphries complained to both Dowd and Christensen that Stinnett's firing of Green was discriminatory because, among other things, Green had informed both Humphries and another associate manager that she could not work that shift. Moreover, according to Humphries, a white employee had failed to appear at work on several occasions without notice, but was not fired. Humphries also reminded Christensen of his earlier complaints

regarding former-general manager Cardin. According to Humphries, Christensen berated him for "going outside the management group" (i.e., turning to Christensen, rather than Dowd, to complain) and demanded that Humphries schedule a meeting with Dowd for the following week.

This scheduled meeting never occurred because on December 5, 2001 (the day before Humphries's scheduled meeting with Dowd), Christensen fired Humphries, based upon Stinnett's complaint that Humphries had left the store safe unlocked during the evening — a charge that Humphries disputes. Humphries also claims that prior to his firing (and before his alleged failure to lock the safe), a cashier warned him that he should watch himself because Christensen and Stinnett were "up to something." After being informed by Stinnett that Humphries had left the safe unlocked, Christensen immediately terminated Humphries — without interviewing him or investigating the incident to determine whether Humphries had actually left the safe open.

Humphries subsequently brought claims of discrimination and retaliation under Title VII and section 1981. The district court dismissed Humphries's Title VII claims due to procedural deficiencies (and Humphries does not appeal this determination). The district court also granted summary judgment in favor of Cracker Barrel on Humphries's section 1981 claims, finding that Humphries failed to establish his prima facie case under either the direct or indirect method. Humphries now appeals.

II. ANALYSIS

A. Historical Overview of Retaliation Claims under Section 1981

Before we turn to the merits of this appeal, we must decide whether Humphries's retaliation claim is cognizable under section 1981. Although Cracker Barrel failed to raise this issue in the district court, it now claims that our decision in *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), precludes Humphries's retaliation claim. In the normal course, when a party fails to present an argument in the trial court, it forfeits the argument on appeal. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 728 (7th Cir. 2004); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990). At oral argument, counsel for Cracker Barrel explained that he did not raise this issue in the district court because *Hart*, which he contended created a change in the law in this circuit, had not yet been issued. Although (as we will explain later), we do not believe that *Hart* changed our jurisprudence regarding section 1981 retaliation claims, we will not penalize Cracker Barrel for failing to raise its argument below.[1]

---

[1] We note that there is some confusion in this circuit as to whether an appellee — as opposed to an appellant — who failed to raise to a particular argument in the district court in support of his motion for summary judgment is precluded from raising new arguments in this court to affirm the district court's ruling. *Compare, e.g.*, *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (holding that appellees waived a claim by failing to raise it in the district court), *and Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir. 1992) (same), *with Transamerica Ins. Co. v. South*, 125 F.3d 392,

Of course, we retain the right to consider forfeited arguments, and may choose to do so "in the interests of justice." *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998); *see also Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993) (holding that "[i]n the rare case in which failure to present a ground to the district court has caused no one — not the district judge, not us, not the appellee — any harm of which the law ought to take note, we have the power and the right to permit it to be raised for the first time to us"). In this instance, given that our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions, it is in the interests of justice to clarify the issue of whether retaliation claims are cognizable under section 1981 (and, in so doing, clarify our ruling in *Hart*). *See Amcast*, 2 F.3d at 749-50 (reaching issue not raised below because it was fully briefed on appeal, rested "entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review, which is plenary on matters of law[, and] there is no reason to defer its resolution to

---

399 (7th Cir. 1997) ("We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmance is a privilege rather than a duty." (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996))). We need not resolve this question because we choose to review this issue, irrespective of whether Cracker Barrel forfeited the issue or not.

another case. There will be no better time to resolve the issue than now."); *Mass. Bay Ins. Co.*, 136 F.3d at 1122 (reaching forfeited choice-of-law issue because "we clearly think it is in the interest of justice to insure that district courts conduct choice-of-law analyses when conflicts questions are presented to them").

1. Section 1981's Origin in the Civil Rights Act of 1866

The language codified in section 1981 derives from section 1 of the Civil Rights Act of 1866, a Reconstruction-era statute that is generally recognized as the first significant civil rights legislation enacted by Congress, and is considered the "initial blueprint of the Fourteenth Amendment." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982); *see generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-37, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968) (discussing legislative history and historical context of the Civil Rights Act of 1866); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 711-22, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (same); *Patterson v. McLean Credit Union*, 491 U.S. 164, 192-200, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (Brennan, J., concurring in part and dissenting in part) (same); Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565 (1989). The legislative history of the Civil Rights Act of 1866 is complicated — and not without substantial interpretive disagreement. *See generally* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*,

2003 Sup. Ct. Rev. 303. The Civil Rights Act of 1866 was passed pursuant to section 2 of the Thirteenth Amendment, which provided Congress with the legislative power to enforce the Thirteenth Amendment's prohibition on slavery. U.S. Const. amend. XIII, § 2. The Act was a direct response to the so-called "Black Codes," a series of legislative acts by many southern (and some northern) states in protest of, and as a tacit attack upon, the recently enacted Thirteenth Amendment. The Black Codes imposed onerous legal limitations on newly-freed former slaves in an attempt to circumvent the requirements of the Thirteenth Amendment, and essentially continued a pattern of legal enslavement. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70, 21 L. Ed. 394 (1873) (noting that following the passage of the Thirteenth Amendment, "[a]mong the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value"); *see generally* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 Harv. J. on Legis. 187, 240-46 (2005) (discussing the Black Codes).

In response to the states' attempts to circumvent the requirements of the Thirteenth Amendment, section 1 of the Civil Rights Act of 1866 conferred a series of legal rights, including the right to contract,

and to hold and convey property, equally to citizens.[2] Portions of section 1 are now codified in section 1981, which states, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

---

[2] In 1870, after ratification of the Fourteenth and Fifteenth Amendments, Congress re-enacted the Civil Rights Act of 1866 (via the Enforcement Act of 1870), and then codified it in sections 1977 and 1978 of the Revised Statutes of 1874. The 1870 re-enactment, which followed passage of the Fourteenth Amendment, has caused significant debate regarding whether sections 1981 and 1982 apply to private actors or, instead, are limited to state actors, pursuant to the Fourteenth Amendment. *Compare, e.g.*, *Jones*, 392 U.S. at 436 (concluding that "it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to limit its application to state action"), *and Runyon v. McCrary*, 427 U.S. 160, 168-69 n.8, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) (same), *with Jones*, 392 U.S. at 449-76 (Harlan, J., dissenting) (evaluating the legislative history and concluding that the Act was intended to reach only state actors), *and Runyon*, 427 U.S. at 195-205 (White, J., dissenting) (same). In any event, it is now well-settled that section 1981 applies to private actors. *See Patterson*, 491 U.S. at 171-76 (refusing to overturn *Runyon*'s determination that section 1981 applied to private conduct).

42 U.S.C. § 1981(a). Other portions of section 1 are now codified in section 1982, which states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

2. *Sullivan v. Little Hunting Park, Inc.* Leads Courts To Conclude that Section 1981 Protects Against Retaliation

The Supreme Court has interpreted section 1981 as providing a broad-based prohibition (and federal remedy) against racial discrimination in the making and enforcing of contracts. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-62, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). The issue of what types of adverse actions are subsumed under the "make and enforce contracts" provision in section 1981 is not without complication, particularly with respect to so-called "postformation conduct" (i.e., adverse acts, such as harassment or retaliation, that occur after an initial contractual relationship has been established). Before its decision in *Patterson*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (which we shall address below), the Supreme Court had not clearly determined whether section 1981 applied to retaliatory conduct. The closest it came to deciding this issue was in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d

386 (1969). In *Sullivan*, a Virginia nonprofit corporation, created to operate a community park and playground facilities for the benefit of residents, refused a proposed assignment of a membership interest to an African-American man. *Id.* at 234-35. The white homeowner who intended to assign his membership interest protested the corporate board's refusal, and the board expelled him from the corporation. *Id.* at 235. He, along with the would-be assignee, brought suit under sections 1981 and 1982. *Id.* The Court initially noted the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived." *Id.* at 237. Relying on the broad protective nature of the Civil Rights Act of 1866, the Court held that the white homeowner had standing to bring a claim under section 1982 (the companion statute to section 1981 pertaining to property rights):

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S. Ct. 1031, 1036, 97 L. Ed. 1586, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

Id. at 237. Although the *Sullivan* court did not explicitly use the term "retaliation" in its decision, it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another (i.e., he had been "punished for trying to vindicate the rights of minorities"). *Id.* (And, indeed, as will be discussed further below, the Supreme Court later interpreted *Sullivan* precisely in this manner in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).)

Following *Sullivan*, and prior to *Patterson*, the general consensus among the circuits was that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including "postformation" adverse acts, such as retaliation. *See, e.g., Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 42-43 (2d Cir. 1984) (retaliation cognizable under section 1981); *Goff v. Continental Oil Co.*, 678 F.2d 593, 597-99 (5th Cir. 1982) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981) (same); *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981) (same). This court, however, did not definitively decide this issue in the pre-*Patterson* era. *See Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989) (noting that although "[t]here is a substantial body of court of appeals precedent" holding that section 1981 forbids retaliation, there was "nothing in this circuit").

3. *Patterson v. McLean Credit Union* Narrows the Reach of Section 1981

In 1989, the Supreme Court issued its decision in *Patterson*, which severely curtailed the reach of section 1981 claims. The *Patterson* court held that section 1981 protections applied exclusively to two types of rights: the right to make contracts and the right to enforce them. 491 U.S. at 176. The first right is violated by a "refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Id.* at 177. Importantly, however, that right "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." *Id.* at 176. The second right, the right to enforce contracts, "does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.* at 177-78. Thus, section 1981's prohibition did not include so-called "postformation" discriminatory conduct of an employer, including the breach of the terms of the contract or imposition of discriminatory working conditions, such as racial harassment. *Id.* at 178-82. *Patterson*, however, was silent as to the issue of retaliation.

Even though *Patterson* involved only racial harassment and the term "retaliation" appears nowhere in the opinion, several circuits — including this one — interpreted *Patterson* as precluding retaliation claims under section 1981 because such employer behaviors purportedly involved now-unprotected postformation conduct. *See, e.g., Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *Carter v.*

South Cent. Bell, 912 F.2d 832, 838-41 (5th Cir. 1990); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 & n.17 (11th Cir. 1990); *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 289 U.S. App. D.C. 332 (D.C. Cir. 1991); *see also Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) (noting that *Patterson* "marked a dramatic change in § 1981 jurisprudence"); *but see Hicks v. Brown*, 902 F.2d 630, 635-38 (8th Cir. 1990) (holding that *Patterson* did not address retaliation claims and should not be read as foreclosing such claims under section 1981). In the immediate aftermath of *Patterson*, we decided *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), in which we observed that "*Patterson* might be thought to foreclose any suggestion that retaliation could be actionable under" section 1981. *Malhotra*, 885 F.2d at 1312. Specifically, we noted that "retaliation and discrimination are separate wrongs. A white person who opposes discrimination against blacks and is fired in retaliation for doing so is not being discriminated against because of his race. . . ." *Id.* (citations omitted). At the same time, we also observed that "it can be argued that someone who retaliates against a person who has a claim of employment discrimination that might be actionable under section 1981 . . . is interfering with the person's *ability* to make or enforce contracts on the same footing with white persons and such interference could be thought itself a violation of section 1981." *Id.* at 1313 (citations omitted) (emphasis in original). Of particular note here, we did not decide whether *Patterson* definitively

precluded retaliation claims, and even hinted that such claims "may well survive *Patterson*." *Id.*

In a concurring opinion in *Malhotra*, Judge Cudahy concluded that *Patterson* did not preclude retaliation claims.[3] Specifically, Judge Cudahy observed that there was "little parallel between harassment and retaliation. Hence, the refusal of *Patterson* to countenance harassment claims under section 1981 has only the most superficial application to claims for retaliation."[4] *Id.* at 1314 (Cudahy, J., concurring); *see also Hicks*, 902 F.2d at 635-38 (holding that *Patterson* applied solely to the unique context of racial harassment and did not preclude retaliation claims). And, in prescient comments that anticipated the Supreme Court's result in *Jackson*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361, Judge Cudahy stated:

---

[3] *See also Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1053 (7th Cir. 1991) (suggesting that *Patterson* may not have foreclosed all retaliation claims).

[4] Judge Cudahy also noted that "to the limited extent *Patterson* is relevant here, it would appear to *support* the recognition of a cause of action for retaliatory conduct" because the *Patterson* court recognized that section 1981's right to "enforce contracts" prohibits efforts to "impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Malhotra*, 885 F.2d at 1314 n.1 (citations omitted). "Clearly, when an employer punishes an employee for attempting to enforce her rights under section 1981, this conduct 'impairs the employee's ability to enforce her contract rights.'" *Id.* This is an intriguing argument, but one that we need not revisit in light of our conclusion that retaliation claims are now covered under section 1981's "make and enforce contracts" provision.

> A prohibition against retaliation is a necessary adjunct to the anti-discriminatory provision itself. If an employee may be fired for complaining of discrimination, his right not to be discriminated against is surely vitiated. . . . The recognition of a right of action for retaliation under section 1981 is simply another application of a straightforward syllogism: if an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those rights, since this would allow the employer to take away a right to protection conferred by statute.

Id. at 1314-15.

Judge Cudahy's view in *Malhotra* did not carry the day in this circuit during the brief post-*Patterson* era. Shortly thereafter, we issued our *McKnight* decision, where we, like most other circuits, interpreted *Patterson* as foreclosing section 1981 coverage of retaliation claims. *See McKnight*, 908 F.2d at 107-08; *see also Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1471-72 (7th Cir. 1993); *McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 688 (7th Cir. 1991). *But see Hicks*, 902 F.2d at 635-38 (holding that *Patterson* did not foreclose retaliation claims). In *McKnight*, the plaintiff brought suit under section 1981 and Title VII, claiming that his employer had discriminated against him based on his race and had fired him in retaliation for complaining about the discrimination. *McKnight*, 908 F.2d at 107-08. Although we noted that "*Patterson* was a racial-harassment case rather than a discharge case," we

nonetheless held that *Patterson*'s "wide-ranging reexamination of section 1981 indicated (as it seems to us) that claims of racially motivated discharge are not actionable under that statute." *Id.* at 108.

Judge Fairchild, however, concurred and dissented in part from the majority's opinion, because, in his view, *Patterson* "did not expressly assert that a racially discriminatory termination would not be a violation of § 1981." *Id.* at 117. Instead, he reasoned that the analysis in *Patterson* was limited to the narrow issue of whether a change in the conditions of employment following the formation of the employment contract (specifically, racial harassment) — but not a termination — violated section 1981. *Id.* As a result, Judge Fairchild concluded that the right to make contracts established in section 1981 protected "the right to continue to work, in the face of racially discriminatory termination" — a result unaltered by *Patterson*. *Id. But see Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) (noting that "*Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect*." (emphasis in original)).

4. The Civil Rights Act of 1991 Supercedes *Patterson*

Whether the majority opinion in *McKnight* or Judge Cudahy's or Judge Fairchild's reading of *Patterson* was correct is now irrelevant because *Patterson*'s influence was short-lived. Unhappy with the result issued in

Patterson, Congress legislatively superceded the *Patterson* decision by enacting the Civil Rights Act of 1991. *See Rivers*, 511 U.S. at 305-06, 305 n.5 (noting that the Civil Rights Act of 1991 was based on Congressional and Presidential disapproval of the *Patterson* decision); *Walker v. Abbott Labs.*, 340 F.3d 471, 475 (7th Cir. 2003) (noting that "Congress, however, quickly responded [to *Patterson*] with the Civil Rights Act of 1991, which, *inter alia*, overruled *Patterson*"). The legislative history of the Civil Rights Act of 1991 makes clear that Congress was dissatisfied with the Supreme Court's narrow reading of section 1981, which strongly curtailed claims that had been cognizable in the pre-*Patterson* period. *See Rivers*, 511 U.S. at 306 n.6 (citing S. Rep. No. 101-315, pp. 12-14 (1990)). Among other things, Congress added subsection (b) to section 1981, which made clear that section 1981 was to be read broadly to include all aspects of the contractual relationship between parties, including the postformation conduct, which *Patterson* had concluded was not actionable under section 1981:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981(b). And the legislative history pertaining to this subsection confirms that Congress intended retaliation to be included under this provision. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 n.12 (11th Cir. 1998) (citing H.R. Rep.

No. 40(I), 102d Cong., 1st Sess. 92 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 630, which states, in part, "[t]he list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring." (emphasis added)).

The Civil Rights Act of 1991 led several circuits to reverse course (again) and to allow retaliation claims under section 1981. *See Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Andrews*, 140 F.3d at 1412-13; *see also Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (8th Cir. 1996) (listing the elements for a *prima facie* case of retaliation under section 1981). For instance, in *Andrews*, the Eleventh Circuit noted that prior to *Patterson*, circuits interpreting section 1981's "make and enforce contracts" provisions had held that it "encompassed an employee's claims for an employer's race-based retaliation during the employment contract." 140 F.3d at 1410. It observed that while *Patterson* "drew into question many circuit court decisions recognizing post-hiring discrimination claims under section 1981," the Civil Rights Act of 1991 reversed whatever limits *Patterson* placed on imposing liability for postformation conduct. *Id.* at 1410-12. As a result, the Eleventh Circuit concluded that retaliation claims remained viable under section 1981. *Id.* at 1412.

B. Humphries's Retaliation Claim Is Cognizable Under Section 1981

1. We Hold that Section 1981 Protects Against Retaliation

This is the first opportunity we have had since the enactment of the Civil Rights Act of 1991 to re-visit the issue of whether section 1981 forbids all retaliatory discharge claims.[5] Cracker Barrel contends that our decision in *Hart* has already foreclosed retaliation claims under section 1981. *See Hart*, 426 F.3d at 866. This is incorrect. Unfortunately, *Hart* has already been cited for this inaccurate proposition. *See Williamson v. Denk & Roche Builders, Inc.*, No. 04 C 4051, 2006 WL 1987808, at *4 (N.D. Ill. July 11, 2006) (citing *Hart* for the proposition that "the Seventh Circuit has made clear that a retaliation claim is not viable under Section 1981"); *Franklin v. U.S. Steel Corp.*, No. 2:04 CV 246, 2006 U.S. Dist. LEXIS 17802 at *6, 2006 WL 905914, at *2 (N.D. Ind. Apr. 7, 2006) (same); *Welzel v. Bernstein*, 436 F. Supp. 2d 110, 117 (D.D.C. 2006) (citing *Hart* for the proposition that this circuit, unlike other circuits, precludes retaliation claims under section 1981). Our analysis in *Hart* was limited to the narrow issue of whether an individual who was *not* the subject of discrimination could assert claims of

---

[5] In *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 n.2 (7th Cir. 1993) we noted that the Civil Rights Act of 1991 had "overruled" *Patterson*, but nonetheless applied the holding of *Patterson* because the Civil Rights Act of 1991 did not have retroactive reach. We also noted, however, that, as a result, "this case represents one of the few in which we still apply the *Patterson* standards." *Id.*

retaliation for complaining about the discrimination of others.[6] We held that section 1981 did not protect against retaliation in such circumstances. *Hart*, 426 F.3d at 866. But *Hart* has no application to the facts here, where the plaintiff is plainly asserting retaliation stemming from discriminatory acts targeting him. (And, as we shall see below, even *Hart*'s limited holding is no longer good law in light of the Supreme Court's *Jackson* decision.)

Thus, the issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the "termination of contracts," and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract.[7] Indeed, the Supreme Court subsequently interpreted the amended provisions of section 1981 as protecting against "discriminatory contract terminations." *Rivers*, 511 U.S. at 302 (stating that "Section 101 of that Act provides that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and

---

[6] Our decision in *Hart* was initially issued as an unpublished order, but, upon motion to publish it filed by a member of the bar, the order was converted to a published opinion.

[7] The at-will nature (i.e., no formal written contract and no specific terms of employment) of the plaintiff's employment here does not preclude the plaintiff from relying on section 1981's provisions pertaining to contracts. *See Walker*, 340 F.3d at 475-77 (holding that at-will employees can state claims under section 1981).

incidents of the contractual relationship, including discriminatory contract terminations"). Now, it may be that, strictly speaking, a discriminatory "termination of contract" is not the same thing as a retaliatory discharge — for instance, analytically, retaliation need not have a discriminatory intent behind it. *See Malhotra*, 885 F.2d at 1312; *Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting). But the Civil Rights Act of 1991 dispensed with this heightened degree of formalism, and the legislative history confirms that Congress intended retaliation to be included within section 1981. *See Andrews*, 140 F.3d at 1411 n.12. As a result, whatever concerns *Patterson* raised about the postformation nature of retaliatory discharges evaporated with the passage of the Civil Rights Act of 1991. *See id.*; *Rivers*, 511 U.S. at 306 n.6. *But see Rivers*, 511 U.S. at 309 n.8 (noting that the "legislative history of the 1991 Act reveals conflicting views about whether § 101 would 'restore' or instead 'enlarge' the original scope of § 1981") and *id.* at 305 ("A legislative response does not necessarily indicate that Congress viewed the judicial decision as 'wrongly decided' as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law — or it may be altogether indifferent to the decision's technical merits — but may nevertheless decide that the old law should be amended, but only for the future.").

2. Our Holding Is Consistent with *Jackson v. Birmingham Board of Education*, which Affirmed *Sullivan*'s Continuing Validity

Even if the statute were unclear on this issue — after all, the specific word "retaliation" still does not

appear in section 1981[8] — and without turning to the pertinent legislative history, the Supreme Court's recent decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) compels the same result. In *Jackson*, the male coach of a girls' high school basketball team sued the Birmingham Board of Education under Title IX of the Education Amendments of 1972, claiming that the Board retaliated against him for complaining about sex discrimination in the high school's athletic program. *Id.* at 171. Title IX prohibits sex discrimination by recipients of federal education funding, but, like section 1981, it contains no express mention of "retaliation." *Id.* at 173. Instead, Title IX simply prohibits "discrimination." The Supreme Court, however, determined that Title IX's proscription on discrimination necessarily subsumed (and implied) acts of retaliation, which it viewed as simply different forms of discrimination:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to

---

[8] *Cf.* 42 U.S.C. § 2000e-3(a) (Title VII) (providing that it is an "unlawful employment practice" for an employer to retaliate against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.").

> differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Id. at 173-74 (citations omitted) (emphasis in original).

The *Jackson* court relied heavily on its prior decision in *Sullivan*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386, where it held that section 1981's companion statute, section 1982, which prohibits discrimination with respect to property rights, contained an implied prohibition against retaliation. *Jackson*, 544 U.S. at 176. Specifically, the *Jackson* court interpreted *Sullivan* as holding that section 1982's general prohibition on racial discrimination, which, like section 1981, makes no mention of retaliation, nonetheless covered "retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* The *Jackson* court also observed that the statutory objective of preventing discrimination would be severely hampered if retaliatory practices were not also banned: "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* at 180 (citing *Sullivan*, 396 U.S. at 237). "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.*

Thus, the *Jackson* court appears to have jettisoned our prior observation that "retaliation and discrimination are separate wrongs." *Cf. Malhotra*, 885 F.2d at 1312; *see Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting)(noting that "[a] claim of retaliation is not a claim of discrimination on the basis of sex" and that "[r]etaliation therefore cannot be said to be discrimination on the basis of anyone's sex, because a retaliation claim may succeed where no sex discrimination ever took place"). Instead, at least for the purpose of interpreting broad statutory discrimination prohibitions that omit specific retaliation provisions, the Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination. *See Jackson*, 544 U.S. at 175 (distinguishing between the structure of Title VII, which includes express retaliation provisions, and Title IX's "implied" cause of action). Moreover, the *Jackson* court noted that a statute targeting discrimination would necessarily be undercut if retaliatory acts evaded its purview. *Id.* at 180. And although *Jackson* directly targeted Title IX, there is no meaningful analytic distinction that renders the conclusion in *Jackson* inapplicable to section 1981.[9] That is, like Title IX, section 1981

---

[9] Our colleague in dissent argues that the analysis in *Jackson* was particularized to Title IX and thus not applicable to our discussion of section 1981. We disagree. In *Jackson*, the Supreme Court relied in large part upon *Sullivan*, a case concerning section 1982. *See, e.g.*, *Jackson*, 544 U.S. at 176 ("Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides valuable context for understanding the statute."); *id.* at 177 ("Retaliation for Jackson's advocacy of the

broadly prohibits discrimination (although only Title IX, enacted roughly a century after section 1981, contains the more contemporary term of "discrimination"), fails to list specific discriminatory practices, and omits specific references to retaliation. *See id.* at 175-76.

Indeed, the fact that Title IX omitted any mention of retaliation, even though it was enacted in 1972, eight years after Title VII and its specific inclusion of retaliation provisions, did not trouble the *Jackson* court nor lead it to conclude that Congress must have intended to exclude retaliation from Title IX's coverage. *See id.* To the contrary, the Court looked to its *Sullivan* decision (which was issued three years before the passage of Title IX) and concluded that it provided "a valuable context for understanding" Title IX. *Id.* at 176. Specifically, the Court stated "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]." *Id.* (quoting

---

rights of the girls' basketball team in this case is discrimination on the basis of sex, just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race."). Therefore, *Jackson*'s reasoning did not depend upon features unique to Title IX, and *Jackson* has implications for cases involving section 1982 and its companion statute — section 1981. Moreover, the *Jackson* Court's reliance upon *Sullivan* affirms *Sullivan*'s continuing validity. Irrespective of our impression of *Sullivan*'s interpretive method, then, we are bound by its holding. That holding, in part, leads us to conclude (as has every circuit to address the question) that a retaliation claim is cognizable under section 1981.

Cannon v. Univ. of Chi., 441 U.S. 677, 699, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)).

Thus, the foundation of the *Jackson* decision is built squarely upon the Court's prior determination in *Sullivan* that section 1 of the Civil Rights Act of 1866 was intended as a broad prohibition on discrimination that contained an implied cause of action for retaliation. *Id.*; *see Sullivan*, 396 U.S. at 237 ("A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived."). And there can be no doubt that *Sullivan*'s examination of section 1982 with respect to implied prohibitions on retaliation readily applies to its companion statute, section 1981, given that sections 1981 and 1982 are simply carve-outs of the same section of the Civil Rights Act of 1866, sharing identical historical origins and concerns. *See, e.g.*, *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982) (noting the shared legislative history between section 1981 and its "companion" section 1982); *Runyon*, 427 U.S. at 170-71 (noting that the holding in *Jones*, 392 U.S. at 437 pertaining to section 1982 necessarily implicated section 1981, given their shared legislative history); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 440, 93 S. Ct. 1090, 35 L. Ed. 2d 403 (1973) (holding that "[i]n light of the historical interrelationship" between sections 1981 and 1982, there was no reason to construe the sections differently solely on the basis that the defendant was a private party); *see also Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (holding that "in

view of both Sections 1981 and 1982 being derived from the Civil Rights Act of 1866 and in view of the similarity in language and intent, no reason is seen not to apply the rationale of *Sullivan* in interpreting Section 1981"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 n.9 (2d Cir. 1975) (same).

3. Our Holding Is Sensible and Aligned with the Weight of Authority

Accordingly, we join the other circuits that have addressed this issue in the post-Civil Rights Act of 1991 era — all of whom uniformly conclude that retaliation claims are cognizable under section 1981. *See Foley*, 355 F.3d at 339; *Hawkins*, 163 F.3d at 693; *Andrews*, 140 F.3d at 1410-11; *Barge*, 87 F.3d at 259. Not only is this result compelled by the Civil Rights Act of 1991 and corresponding Supreme Court authority, but it is also the sensible result. To hold that section 1981 allows unfettered retaliation is to invite wholesale circumvention (and eventual undermining) of the statute, and it would create perverse incentives for the employer to fire complainants as quickly as possible to thereby limit (or entirely avoid) damages under section 1981. *See, e.g.*, *Goff*, 678 F.2d at 598 (noting that "Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute"). This is not an insignificant issue, as section 1981 damages often have more teeth than those available under Title VII.

There is no traction in observing that Title VII provides a back-up or competing statutory regime to the plaintiff. *See generally Randolph v. IMBS, Inc.*,

368 F.3d 726, 732 (7th Cir. 2004) (noting the significant overlap and differences in the two statutory schemes). Although the substantive overlap and procedural inconsistencies between section 1981 and Title VII animated the Court's concerns in *Patterson*, Congress is not bothered by this parallel statutory scheme. *See Johnson*, 421 U.S. at 459 ("'[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.'" (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) and H.R. Rep. No. 92-238, at 19 (1971)); *see also Patterson*, 491 U.S. at 201-12 (Brennan, J., concurring and dissenting in part) (citing and discussing legislative history indicating that Congress intended to maintain section 1981 and Title VII as "separate, distinct, and independent"); *Randolph*, 368 F.3d at 732. Nor is it our role to attempt to harmonize these statutes or seek to channel particular causes of action toward one or the other statute. Congress has unmistakably provided for two separate regimes to redress, in many instances, identical discriminatory practices in the employment context. The resolution of any inefficiencies resulting from the existence of two parallel (but quite different) statutory regimes that cover similar harms, but contain differing procedural requirements, limitations periods, and remedies, resides with Congress, not us.

4. We Overturn *Hart* to the Extent that it Conflicts with *Sullivan* and *Jackson*

We must now briefly return to *Hart*, where we held that a white employee who alleged that he suffered retaliation for supporting his co-worker's charge of discrimination could not maintain such a claim because section 1981 "encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination." *Hart*, 426 F.3d at 866. In so holding, we relied solely on the Eleventh Circuit's decision in *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956 (11th Cir. 1997), which held that a white employee who opposed a co-worker's racially derogatory remark could not bring a section 1981 retaliation claim because he did not contend that the employer "discriminated against him because he was white" (i.e., did not claim direct discrimination). *Id.* at 961. The *Little* decision, however, cited no authority for this proposition, nor did it provide reasoning for this declaration.[10] *Id.* We likely placed too much reliance on *Little*, given that its holding runs squarely against the Supreme Court's *Sullivan* decision, as well as the Court's subsequent decision in *Jackson*, which further solidified *Sullivan*'s holding. *See Sullivan*, 396 U.S. at 237; *Jackson*, 544

---

[10] In addition, the Eleventh Circuit subsequently hinted that *Little* may conflict with its decision in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), which held that a class of employees could proceed on a section 1981 retaliation claim based on allegations that they were fired for refusing to participate in an employer's discrimination against non-white customers. *See Andrews*, 140 F.3d at 1412 n.14.

U.S. at 173-74; *see also Warth v. Seldin*, 422 U.S. 490, 514 n.22, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (citing *Sullivan* for the proposition that sections 1981 and 1982 are examples of "exceptions" that allow parties "to raise putative rights of third parties," including such situations where a party is "punished" for entering into a contractual relationship with an individual protected under the statute). *Jackson*, which was issued after *Little*, but while the *Hart* appeal was pending, made clear that *Sullivan* prohibits "retaliation against those who advocate the rights of groups protected" by section 1 of the Civil Rights Act of 1866. *Jackson*, 544 U.S. at 176. Thus, *Sullivan* stands for the proposition that a "white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" *Id.* at 176 n.1. Aside from conflicting with *Sullivan* and *Jackson*, the *Little* decision is plainly the minority view among the circuits: the great weight of authority is that individuals who suffer retaliation for opposing the racial discrimination suffered by others have standing to assert retaliation claims under section 1981.[11]

---

[11] *See, e.g., Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (holding that corporation had standing to bring section 1981 claim and that "to invoke § 1981 or § 1982 one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (white plaintiff could bring section 1981 claim based upon allegation that his employer "'forced' him into retirement solely because he had sold his house to a black person"); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903, 906-07

As a result, it is clear that our decision in *Hart* cannot survive scrutiny under *Sullivan*, as expanded by the Court in *Jackson*. Moreover, our decision is out-of-step with the outcomes reached in the vast majority

---

(3d Cir. 1980) (summary judgment inappropriate where material issues of fact remained regarding section 1981 claim brought by plaintiff who claimed he was discharged for supporting rights of African-American co-workers); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 (4th Cir. 1980) (white student protected under section 1981 from retaliation by school because of her association with a black schoolmate); *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1229 (5th Cir. Unit B 1982) (retaliatory discharge claim allowed under section 1981 where evidence showed plaintiff was discharged for lawful advocacy of minority and union rights); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (holding that it was clear under "well-settled" law that a plaintiff "need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement of his claims[,]" but rather plaintiff's advocacy on behalf of minorities was sufficient to allege retaliation under section 1981); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (white plaintiff had standing under section 1981 for claim that employer fired him because he objected to discriminatory discharge of an African-American co-worker); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white employee fired for helping African-American co-worker file an EEOC claim could state a claim under section 1981); *see also Malhotra*, 885 F.2d at 1316 (Cudahy, J., concurring) (noting that "a white person who is discharged for espousing the rights of minorities could establish that the employer acted with discriminatory intent (as required to state a claim under section 1981); that the racial discrimination was directed at another, rather than directly at the plaintiff, is irrelevant, since it is the plaintiff who is suffering due to the employer's racial discrimination" and citing *Sullivan* and cases from other circuits in support).

of cases outside of our circuit. Accordingly, we overrule our holding in *Hart* on this limited issue.[12] We now hold that a plaintiff may maintain a cause of action under section 1981, where the plaintiff has suffered retaliation for advocating the rights of those protected under section 1981. *See Jackson*, 544 U.S. at 179-80.

C. Humphries Presented a Claim of Retaliation Sufficient to Survive Summary Judgment

Turning to the merits of Humphries's retaliation claim under section 1981, we generally have applied the same prima facie requirements to discrimination claims brought under Title VII and section 1981. *See, e.g., Alexander v. Wis. Dep't of Health & Family Servs.*, 263 F.3d 673, 682 (7th Cir. 2001) (applying same standard to Title VII and section 1981 discrimination claims); *Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 940 (7th Cir. 1996) ("Although section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical."); *Randle v. LaSalle Telecomms., Inc.*, 876 F.2d 563, 568 (7th Cir. 1989) ("It is well settled that the methods and order of proof applicable to a claim of disparate treatment under Title VII are equally availing under § 1981."); *see also Patterson*, 491 U.S. at 186 (applying *McDonnell Douglas* framework to section 1981 claims). We see no

---

[12] Because this opinion overrules a prior case, it has been circulated in advance of publication to all judges of this court in regular active service pursuant to Seventh Circuit Rule 40(e). A majority did not favor a rehearing en banc on the question of overruling *Hart*, 426 F.3d 863.

reason to apply different requirements between the statutes with regard to retaliation claims. *See Foley*, 355 F.3d at 340 n.8 (approving of the same standard applied to retaliation claims under Title VII and section 1981); *see also Hasan v. Dep't of Labor*, 400 F.3d 1001, 1003-04 (7th Cir. 2005) (applying Title VII prima facie requirements to retaliation cases brought under the Energy Reorganization Act); *Larimer v. I.B.M. Corp.*, 370 F.3d 698, 702 (7th Cir. 2004) (applying Title VII prima facie requirements to retaliation claim under ERISA).

To overcome Cracker Barrel's motion for summary judgment, Humphries may proceed under either the direct or indirect methods. *See Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003) (citing *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002)). Under the direct method, Humphries must present direct evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. *Id.*; *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006). Under the indirect method, he must show that after opposing the employer's discriminatory practice only he, and not any similarly situated employee who did not complain of discrimination, was subjected to a materially adverse action even though he was performing his job in a satisfactory manner. *See Sylvester v. SOS Children's Villages Ill., Inc.*, 453 F.3d 900, 902 (7th Cir. 2006); *White*, 126 S. Ct. at 2415. Thus, the indirect "method of establishing a prima facie case requires proof both of similarly situated employees and of the plaintiff's performing his job satisfactorily." *Sylvester*, 453 F.3d at 902.

Under the district court's view (which, naturally, Cracker Barrel echoes on appeal), Humphries's prima facie case failed because, among other reasons, he did not present sufficient evidence to meet the similarly situated requirement under the indirect method.[13] According to Cracker Barrel, similarly situated comparators *must* have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, and, under Cracker Barrel's view, Humphries's two comparators, Stinnett and Dowd, fail that test.

Cracker Barrel's view of our similarly situated requirement is too rigid and inflexible. This requirement "should not be applied mechanically or inflexibly." *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 952 (7th Cir. 2006). True, we have sometimes stated the similarly situated requirement in the "must" terms that Cracker Barrel argues, but a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement "*normally* entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Radue v. Kimberly-Clark Corp.* 219 F.3d 612, 617-18 (7th Cir. 2000)

---

[13] We need not decide whether Humphries has enough evidence under the direct method because he meets the requirements of the indirect method.

(emphasis added); *see also Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 644 (7th Cir. 2006); *Ezell v. Potter*, 400 F.3d 1041, 1049-50 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004); *Lucas v. Chi. Transit Auth.*, 367 F.3d 714, 733 (7th Cir. 2004); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 580 (7th Cir. 2003); *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 546 (7th Cir. 2002); *Snipes v. Ill. Dep't of Corr.*, 291 F.3d 460, 463 (7th Cir. 2002); *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002). In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." *Radue*, 219 F.3d at 617. "As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity." *Id.* at 618; *see also Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006); *Ezell*, 400 F.3d at 1050.

In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated." *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (discussing the similarly situated requirement in the equal protection context). Instead, courts should apply a "common-sense" factual inquiry — essentially, are there enough common features between the individuals to allow a meaningful comparison? *Id.* (citing *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382-83 (7th Cir. 2000) and *Radue*, 219 F.3d at 619). Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing

roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. *See Hull*, 445 F.3d at 951-52.

It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees — distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. *See, e.g.*, *Ezell*, 400 F.3d at 1050. Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as well as to the extent to which the plaintiff cherry-picks would-be comparators, *see Crawford v. Ind. Harbor Belt R.R. Co.*, 461 F.3d 844, 845-46 (7th Cir. 2006), but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation — recall that the plaintiff need not *prove* anything at this stage.

Establishing a prima facie case should not be such an onerous requirement: "the plaintiff's evidence on the prima facie case need not be overwhelming or even destined to prevail; rather, the plaintiff need present only 'some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion.'"

Bellaver v. Quanex Corp., 200 F.3d 485, 493 (7th Cir. 2000) (quoting *Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir. 1997) (also noting that the prima facie burdens "should not be applied rigidly")); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). "The prima facie case, and specifically its fourth prong, are meant to identify situations where the 'actions taken by the employer, . . . if unexplained, are more likely than not based on consideration of impermissible factors.'" *Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) (quoting *Allen v. Diebold, Inc.*, 33 F.3d 674, 678 (6th Cir. 1994)). But the method of inquiry established by *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). After all, our intention in establishing the similarly situated requirement was to provide plaintiffs the "boost" that the *McDonnell Douglas* framework intended. *See Stone*, 281 F.3d at 643.

With this legal and policy backdrop in mind, we now turn to the would-be comparators in this case. It is clear that Stinnett was a sufficient comparator. He held the same associate manager position as Humphries, with the same duties, including responsibility for ensuring the safe was locked at all times. He shared the same supervisor (Dowd) and same ultimate decisionmaker (Christensen). Like Humphries, Stinnett had received past negative performance evaluations, including low ratings on "asset protection" categories. In addition, Humphries presented competent testimony (both his own and that

of a co-worker) that Stinnett — like Humphries — had used a so-called Gold Card to pay for a meal that a customer had complained about, apparently in contravention of Cracker Barrel policy. In addition, Humphries presented evidence that Stinnett's termination of Green (the immediate precursor event connected to Humphries's termination) was impermissible (under Cracker Barrel policy, only general managers, not associate managers, can fire employees). If anything, the record tends to suggest that Humphries generally performed slightly better than Stinnett. In addition, Humphries presented evidence that Stinnett also left the safe unlocked. Specifically, Humphries testified that Stinnett (and Dowd) routinely left the safe unlocked — the very basis for which Humphries was fired, and one which Humphries hotly disputes.

Cracker Barrel seeks to distinguish Stinnett on the grounds that he left the safe unlocked during the *daytime* (i.e., business hours) whereas Humphries left it unlocked during the *nighttime* (i.e., overnight). This is a distinction without much difference. Although arguments can be made as to relative greater potential harm of leaving the safe unlocked at night, the issue remains that it was contrary to Cracker Barrel policy to leave the safe unlocked and unattended at any point during the 24-hour day. More importantly, Cracker Barrel's argument here reflects precisely the type of formalistic argument that should not carry the day at summary judgment. Humphries was not required to show an identity of wrongful conduct: "the law is not this narrow." *Ezell*, 400 F.3d at 1050. It was enough to show "similar — not identical — conduct" and this surely qualifies under that standard. *Id.* To find

otherwise is to lose sight of the big-picture, common-sense perspective. Thus, in terms of job titles, work duties, supervisor, and work performance histories, Stinnett and Humphries have more than sufficient similarity. A single comparator will do; numerosity is not required.[14] *See, e.g.*, *Goodwin*, 442 F.3d at 619; *Ezell*, 400 F.3d at 1050.

Cracker Barrel also contends that it established that it had a legitimate reason for firing Humphries, and that Humphries failed to show that the reason that Cracker Barrel provided for his discharge was pretext (i.e., a lie). *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 417-19 (7th Cir. 2006) (discussing general requirements to establish pretext). On these issues, we agree with the district court's determination that the record is replete with contested material facts pertaining to Humphries's work performance and the nature of Christensen's beliefs when he terminated Humphries. As an initial matter, Humphries contends that he did not leave the safe unattended, and the evidence implicating him is comprised solely of the testimony from Stinnett — the very individual Humphries targeted in his final complaint of discrimination. And there is testimony in the record that a co-worker observed Stinnett and Dowd acting differently (less deferentially) toward Humphries just prior to his firing, and that this co-worker specifically warned Humphries about Stinnett and Dowd because she believed that their behavior indicated that they were "up to something to harm Humphries." In

---

[14] Because we conclude the Stinnett was an adequate comparator, we need not address whether Dowd fits the requisite criteria.

addition, prior to firing Humphries, it appears that Christensen conducted no investigation into the veracity of Stinnett's claim. He did not interview Humphries; he simply credited Stinnett's story. Finally, the timing of Humphries's firing is suspicious: he was fired one week after he complained to Christensen about discriminatory practices and one day prior to a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of Humphries's complaints. Finally, there was evidence in the record tending to show that similar transgressions were not sufficient to fire other similarly situated employees who did not complain of discrimination. *See generally Curry v. Menard, Inc.*, 270 F.3d 473, 479 (7th Cir. 2001) (holding that a showing that similarly situated employees were treated differently may be enough to establish pretext).

This is not to say that merely pointing to an employer's shoddy investigatory efforts is sufficient to establish pretext. Erroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons. *See Forrester*, 453 F.3d at 419; *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1012-13 (7th Cir. 2004). But, under the circumstances here, there was sufficient other circumstantial evidence in the record to support a reasonable inference that Humphries was "set-up" by Stinnett (in tandem with Dowd and Christensen), *see Sylvester*, 453 F.3d at 905, and that his purported bad act of leaving the safe unlocked was a fabrication to justify his firing. In this sense, the quality of Christensen's investigation may have some bearing on the truthfulness of Cracker

Barrel's proferred reasons for terminating Humphries. In short, these are the sort of disputed factual issues that a jury should sort out.

As a final note, on remand, Humphries will have only his claim of retaliation. We agree with the district court's determination that he waived (forfeited would be the better term) his discrimination claim by devoting only a skeletal argument in response to Cracker Barrel's motion for summary judgment. Although Humphries did attempt to incorporate his well-developed arguments pertaining to the retaliation claim, and there is substantial over-lap with regard to the prima facie requirements between the two claims, he did nothing more. On appeal, however, Humphries addresses for the first time the issue of his replacement, and Cracker Barrel outlines a series of arguments as to why Humphries's reprimands and warnings do not constitute materially adverse employment actions. None of these arguments were reached by the district court nor flushed out in the briefing — this is precisely why we insist on parties raising all pertinent arguments below. Given that Humphries's core claim is one for retaliation, there is little inequity in applying our typical forfeiture rule to this particular claim.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we AFFIRM the grant of summary judgment in favor of the defendant on Humphries's discrimination claim, and

we REMAND for further proceedings in accordance with this opinion.

EASTERBROOK, *Chief Judge*, dissenting in part. The Supreme Court held in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), that Title IX of the Education Amendments of 1972 — which forbids educational programs that receive federal funds from discriminating on account of sex, 20 U.S.C. § 1681(a) — allows the judiciary to define the word "discriminate." The Court used that authority to curtail steps that make reports of discrimination costly to students and employees. Today this court attributes to *Jackson* the conclusion that *all* federal statutes dealing with the employment relation prohibit retaliation.

The Justices gave three principal reasons for their decision in *Jackson*. (1) The word "discrimination" has sufficient ambiguity to permit a reading that includes an anti-retaliation norm. 544 U.S. at 173-74. (2) Title IX was enacted in 1972, after anti-retaliation norms became common, making it sensible to resolve the ambiguity in favor of this reading. 544 U.S. at 176. (3) Lack of an anti-retaliation norm would make it too easy for educational programs to undermine the principal substantive rules in Title IX by getting rid of anyone who tried to enforce them. 544 U.S. at 180-81.

None of these reasons applies to 42 U.S.C. § 1981, the subject of today's decision. (1) The word "discriminate" does not appear in § 1981. What that statute provides is that all citizens have the same right to make and enforce contracts. How can a

decision that resolves ambiguity in the word "discriminate" apply to other statutes with different language? (2) Section 1981 was enacted in 1866, long before anti-retaliation norms were created. The first mention of "retaliatory discharge" in any federal appellate opinion came in *NLRB v. Arthur Winer, Inc.*, 194 F.2d 370 (7th Cir. 1952), and the first use by the Supreme Court was *NLRB v. Scrivener*, 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). (3) Lack of an anti-retaliation norm in § 1981 would not hinder enforcement of civil rights laws, because there is a *real* anti-retaliation rule in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-3(a). That's one reason why *Jackson* distinguished Title IX of the 1972 Act from Title VII of the 1964 Act. 544 U.S. at 175. *Cf. Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (holding that there is no general anti-retaliation doctrine under 42 U.S.C. § 1983).

The question at issue today is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed to file a timely charge under Title VII and engage in conciliation before turning to court. By adding an anti-retaliation rule to § 1981, the majority does not craft an ancillary doctrine necessary to make the principal norm work (as the Court did in *Jackson*); instead it demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court.

This is not the first time that a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII. The Court held

in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), that § 1981 should be construed when possible to avoid conflict with Title VII. Today, however, the majority does exactly what *Patterson* forbids. It reads § 1981 to have the same substantive content as Title VII, but without features such as short periods of limitations that employees find inconvenient. That's not a sound way to treat this statute, already extended far beyond its original meaning. *See Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); Charles Fairman, VI *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88 (Part One)* 1207-60 (1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. *Patterson* holds that the process of judicial extension must stop.

Congress can add to a law's reach, and in 1991 it did so — but the 1991 revision does not mention "retaliation" or change the text of § 1981(a), on which Humphries's claim rests. When § 1981 and Title VII have different but overlapping provisions (as they do, for example, with respect to damages), then the judiciary must enforce both. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 141-44, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001); *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). But the fact that overlapping systems may coexist does not justify *creating* incompatibility, as the majority does today. Section 1981 does not contain an anti-retaliation rule. When deciding whether to add such a rule to § 1981,

we must consider the effect that this step would have on Title VII. That's the holding of *Patterson*.

To the extent that my colleagues treat the 1991 legislation as discarding *all* of *Patterson*, they follow an approach that was rejected in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), and *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Legislation does not "overrule" decisions of the Supreme Court; new statutes adopt new rules but leave in place existing norms that the legislation does not touch. Nothing in the Civil Rights Act of 1991 justifies reading § 1981 more broadly than its (amended) text or undermining parts of Title VII that remain in force. The Court demonstrated this in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006), which unanimously reversed a decision that had invoked the judges' views of wise public policy to extend § 1981. *Domino's Pizza* shows that *Patterson* cannot be treated as defunct. The Supreme Court has cited *Patterson* favorably in 24 decisions since *Landgraf* and *Rivers*. Of these, *Domino's Pizza* is the most salient because it uses *Patterson*'s interpretive methodology to construe § 1981 as amended by the Civil Rights Act of 1991.

My colleagues end up declaring that the text of §1981, its context, its history (the absence of anything like an anti-retaliation norm in 1866), its function, and the effect of an inventive reading on the operation of Title VII all are irrelevant. The rule they impute to *Jackson* has no moorings in any statute's text or provenance. Yet that's not at all what *Jackson* says; it dealt with the actual language and operation of Title

IX and does not justify a language-and-history-free interpretation of all federal statutes. I do not think it likely that the Supreme Court, which insists that statutory language be followed even if inconvenient or jarring — *see, e.g.*, *Arlington Central School District v. Murphy*, 126 S. Ct. 2455, 2463, 165 L. Ed. 2d 526 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2625-27, 162 L. Ed. 2d 502 (2005); *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005); *Tyler v. Cain*, 533 U.S. 656, 663 n.5, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) — would accept such an atextual approach. I appreciate the temptation to make every law "the best it can be," but that is not the Supreme Court's current mode of statutory interpretation, as *Domino's Pizza* shows for § 1981 in particular.

Perhaps it *was* the approach that prevailed in 1969, when the Court decided *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). The majority in *Sullivan* held that a plaintiff in litigation under 42 U.S.C. § 1982 has standing to complain about retaliation, and *Jackson* concluded that it must have had a substantive component too. So read, *Sullivan* is of a piece with other decisions holding that judges may supplement statutes to make them "more effective." *See, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). But *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), abandoned that approach, and since the 1970s the Court has lashed interpretation more closely to statutory text. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very

essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (emphasis in original).

It is anachronistic to say that, because *Sullivan* engaged in a freewheeling "interpretation" of § 1982, we may today take liberties with § 1981. One might as well cite *Borak* for the proposition that "every right implies a remedy" so that courts should today create a private right of action for every statute other than those that the Supreme Court addressed in *Cort* and its successors.

Yet that is the majority's tack. The argument goes that, because *Sullivan* ignored the language of § 1982 and drafted an "improved" version of the statute, we are free to do the same today for § 1981, its neighbor. The Supreme Court requires us to proceed otherwise. *Borak* dealt with § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). It was as freewheeling in "interpreting" that law as *Sullivan* was with § 1982. Yet the Court has held that the change of interpretive method announced in *Cort* applies to all other sections of the Securities Exchange Act. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977) (§ 14(e)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) (§ 17(a)). *Borak* and similar decisions from the 1960s have not been overruled, but we have been told in no uncertain terms that they must not be extended. Indeed, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed.

2d 929 (1991), the Court declined to apply *Borak* to a portion of § 14(a) that had not been involved in *Borak*. So that case has been limited to a single sentence of one subsection. Why, then, may the method of *Sullivan* be applied to other sections of the Civil Rights Act of 1866 despite intervening precedent?

There has been a sea change in interpretive method between *Sullivan* and today — and *Patterson* not only exemplifies the change but also applies it to § 1981. In 1989 the Justices were invited to rely on *Sullivan* as a model for the interpretation of § 1981. They declined. Less than a year ago, in *Domino's Pizza*, the Court reiterated Patterson's interpretive stance. *Sullivan*, by contrast, did not receive a mention. Yet my colleagues do not mention *Domino's Pizza*. Why bypass the Supreme Court's 2005 understanding of § 1981 in favor of a 1969 understanding of § 1982? We must respect our superiors' decision to call a halt to judicial extrapolation; *Domino's Pizza* rather than *Sullivan* exemplifies the appropriate judicial role. By relying on *Sullivan*, my colleagues indulge an assumption — that if some remedies are good, then more must be better — that has no support on today's Supreme Court.

Now if § 1981 had been enacted while the freewheeling approach of *Sullivan* was in force, it might well be appropriate to adopt a goal-driven reading. To use the interpretive tools of the last 30 years to unravel a statute passed in earlier days would be to cross up the legislature. That was a point the Court made in *Jackson*: Title IX was enacted in 1972, and Congress may well have anticipated that *Sullivan*-like construction would follow. 544 U.S. at 176. The legislators who voted for § 1981 in 1866 would not

have anticipated any such judicial liberties, however; and when § 1981 was amended in 1991, decisions such as *Cort* and *Rodriguez* and *Patterson* had announced a textual approach. So when a question arises in 2006 about the meaning of this 1866/1991 legislation, our job is to apply the interpretive norms that prevailed in 1866, 1991, and today, not to take an ambiguous decision from 1969 and see how far we can run with it.

Section 1981 does offer one opening for a claim in the nature of retaliatory discharge. Suppose Cracker Barrel regularly fired black employees who protest discrimination in the workplace, but not protesting white employees. Then it might be appropriate to conclude that black persons do not enjoy the same right as white persons to contract with Cracker Barrel. But Humphries does not make such an argument. For all this record shows, Cracker Barrel fires every complainer, without regard to the subject of the complaint. An employer that treats everyone the same in this respect complies with § 1981, so the judgment should be affirmed.

A true Copy:

Teste:

/s/_____

Clerk of the United States Court of Appeals for the Seventh Circuit

74 54699

(5)

57 No. 06-1431

In the
Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONER

Michael W. Hawkins
Counsel of Record
Michael J. Newman
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Michael Zylstra
General Counsel and
Vice President
CBOCS West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, TN 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Is a retaliation claim cognizable under 42 U.S.C. § 1981 where an employee complains about race discrimination?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner CBOCS West, Inc. makes the following disclosures: Petitioner is wholly owned by its parent, Cracker Barrel Old Country Store, Inc.; and Cracker Barrel Old Country Store, Inc. is wholly owned by its parent, CBRL Group, Inc., a publicly traded company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINION AND ORDERS BY LOWER COURTS 1

JURISDICTIONAL STATEMENT 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

I. STATUTORY BACKGROUND 2

II. FACTUAL BACKGROUND 4

III. LOWER COURT PROCEEDINGS 5

SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. THE PLAIN TEXT OF SECTION 1981 DOES NOT PROVIDE FOR A CAUSE OF ACTION BASED ON RETALIATION 10

II. CONGRESS INTENDED TO EXCLUDE A CAUSE OF ACTION BASED ON RETALIATION FROM SECTION 1981 WHEN IT DRAFTED AND AMENDED IT 14

A. Congress Exhibited Its Intent To Exclude A Cause Of Action Based On Retaliation From Section 1981 By Including Such Protection In Similar Anti-Discrimination Statutes, But Excluding It From Section 1981 15

B. Congress Exhibited Its Intent To Exclude Retaliation From Section 1981 Because It Knew Courts Would Only Analyze The Actual Language of Section 1981 19

C. General Statutes Like Section 1981 Do Not Subsume Detailed Statutes Like Title VII 21

III. LEGISLATIVE HISTORY CANNOT BE USED TO CREATE A CAUSE OF ACTION BASED ON RETALIATION UNDER SECTION 1981 WHEN THE STATUTE IS CLEAR 26

IV. THE SEVENTH CIRCUIT'S RELIANCE ON *SULLIVAN V. LITTLE HUNTING PARK, INC.* AND *JACKSON V. BIRMINGHAM BOARD OF EDUCATION* WAS ERRONEOUS BECAUSE THOSE CASES ARE DISTINCTLY DIFFERENT FROM THIS CASE 33

A. *Sullivan v. Little Hunting Park, Inc.* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case 34

B. *Jackson v. Birmingham Board of Education* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case 36

V. PUBLIC POLICY DEMANDS THAT THE COURT REVERSE THE SEVENTH CIRCUIT'S DECISION IN THIS CASE .. 39

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

Adams v. City of Chicago,
865 F. Supp. 445 (N.D. Ill. 1994) 28, 42

Andrews v. Lakeshore Rehab. Hosp.,
140 F.3d 1405 (11th Cir. 1998) 27, 42

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
__ U.S. __, 126 S. Ct. 2455 (2006) 17, 27

Bate Refrigerating Co. v. Sulzberger,
157 U.S. 1 (1894) 8

Bedroc Limited, LLC v. United States,
541 U.S. 176 (2004) 11, 14, 35

Bulova Watch Co. v. United States,
365 U.S. 753 (1964) 21

Burlington N. & Santa Fe Ry. Co. v. White,
__ U.S. __, 126 S. Ct. 2405 (2006) ..... *passim*

Caminetti v. United States,
242 U.S. 470 (1927) 8, 11

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992) 27

Cort v. Ash,
422 U.S. 66 (1975) 20, 35

D. Ginsberg & Sons v. Popkin,
285 U.S. 204 (1932) 22

Domino's Pizza, Inc. v. McDonald,
546 U.S. 470 (2006) ..... *passim*

Emerald Investors Trust v. Gaunt Parsippany Partners,
492 F.3d 192 (3d Cir. 2007) 40

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 26, 30, 32

Hart v. Transit Mgt. of Racine, Inc.,
426 F.3d 863 (7th Cir. 2005) 6

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 8, 11

Hawkins v. 1115 Legal Serv. Care,
163 F.3d 684 (2d Cir. 1998) 27, 42

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) ..... *passim*

Jones v. Bock,
__ U.S. __, 127 S. Ct. 910 (2007) 32

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004) 25, 41

Lake County v. Rollins,
130 U.S. 662 (1889) 8

Lamie v. United States Trustee,
540 U.S. 526 (2004) 8, 11, 35

Ledbetter v. The Goodyear Tire & Rubber Co., Inc.,
__ U.S. __, 127 S. Ct. 2162 (2007) ..... *passim*

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 23

Morton v. Mancari,
417 U.S. 535 (1974) 21, 36, 38

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
__ U.S. __, 127 S. Ct. 2518 (2007) 21

Occidental Life Ins. of Cal. v. EEOC,
432 U.S. 355 (1977) 23

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) ..... *passim*

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 21, 25

Ratzlaf v. United States,
510 U.S. 135 (1994) 26, 27, 32

Rodriguez v. United States,
480 U.S. 522 (1987) 20, 35

Runyon v. McCarey,
427 U.S. 160 (1976) 10

Russello v. United States,
464 U.S. 16 (1983) 15, 18, 31

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) ..... *passim*

Thomas v. Exxon, U.S.A.,
943 F. Supp. 751 (S.D. Tex. 1996),
aff'd, 122 F.3d 1067 (5th Cir. 1997) 27, 42

Townsend v. Little,
109 U.S. 504 (1883) 21

United States v. Ron Pair Enter., Inc.,
489 U.S. 235 (1989) 8, 11

United States v. Borden Co.,
308 U.S. 188 (1939) 36

United States v. Dieter,
429 U.S. 6 (1976) 40

W. Va. Univ. Hosps. v. Casey,
499 U.S. 83 (1991) 16, 17, 18, 31

Zedner v. United States,
__ U.S. __, 126 S. Ct. 1976 (2006) 30

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.,
__ U.S. __, 127 S. Ct. 1534 (2007) 14

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) (2006) 1

28 U.S.C. § 1658 (2006) 24, 41

29 U.S.C. § 158(a)(4) (2006) 4, 17

29 U.S.C. § 215(a)(3) (2006) 4, 17

29 U.S.C. § 623(d) (2006) 4, 17

29 U.S.C. § 2615 (2006) 4, 17, 18

38 U.S.C. § 4311(b) (2006) 4, 18

42 U.S.C. § 1981 (2006) ..... *passim*

42 U.S.C. § 1981(a) (2006) 1, 2, 10

42 U.S.C. § 1981(b) (2006) ..... *passim*

42 U.S.C. § 1981a(b)(3) (2006) 24

42 U.S.C. § 1981a(c) (2006) 4

42 U.S.C. § 1982 (2006) 34, 35

42 U.S.C. § 1988 (2006) 16, 17

42 U.S.C. §§ 2000e *et seq.* (2006) 9

42 U.S.C. § 2000e-2(a) (2006) 24

42 U.S.C. § 2000e-2(k) (2006) 4

42 U.S.C. § 2000e-3(a) (2006) ..... *passim*

42 U.S.C. § 2000e-4 (2006) 3

42 U.S.C. § 2000e-5(e)(1) (2006) 3, 24, 40

42 U.S.C. § 2000e-5(f)(1) (2006) 4, 24

42 U.S.C. § 12203(a) and (b) (2006) 4, 17, 18

49 U.S.C. § 31105 (2006) 4, 18

MISCELLANEOUS

U.S. CONST. ART. I 8, 11

U.S. CONST. ART. II 8, 42

U.S. CONST. ART. III 8

Developments in the Law - Section 1981, 15 HARV. C.R.-C.L. L. REV. 29 (1980) 2

ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Princeton University Press 1998) 32

Antonin Scalia, *How Democracy Swept the World*, Wall St. J., Sept. 7, 1999, at A24 ..... 7, 42

THE FEDERALIST NO. 78, at 401-02 (Alexander Hamilton) (Phoenix Press Paperback ed. 2000) 8, 9, 11

H.R. REP. NO. 102-40, pt. 2, at 72 (1991) . 28, 30, 31

S. REP. NO. 101-315, at 45 (1990) 29, 30

BLACK'S LAW DICTIONARY 163 (7th ed. 1999) 2

THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY, (Clarendon Press 1991) 12, 13

WEBSITES

EEOC Charge Statistics, http://www.eeoc.gov/stats/race.html (last viewed Nov. 13, 2007) 39

EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last viewed Nov. 13, 2007) 39

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BY LOWER COURTS

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 474 F.3d 387 (7th Cir. 2007). JA 117-166. The opinion of the United States District Court for the Northern District of Illinois concerning Petitioner's Motion for Summary Judgment is published at 392 F. Supp. 2d 1047 (N.D. Ill. 2005). JA 108-116. The opinion of the United States District Court for the Northern District of Illinois concerning Petitioner's Motion to Dismiss is published at 343 F. Supp. 2d 670 (N.D. Ill. 2004). JA 82-92.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 10, 2007. JA 117. A timely Request for Rehearing was denied on January 29, 2007. Pet. App. 1a. The Petition for Writ of *Certiorari* was filed on April 25, 2007, and was granted on September 25, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, a part of the Civil Rights Act of 1866, and later amended in the Civil Rights Act of 1991:

> Section 1981(a) – All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

and enforce contracts . . . as is enjoyed by white citizens . . . .

Section 1981(b) – For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Passed by Congress in 1866, 42 U.S.C. § 1981 (hereinafter "Section 1981") guarantees to every person "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (2006). Largely unaltered to this day, Section 1981 is an historical statute.

Shortly after the Civil War, some states enacted laws that are commonly referred to as the Black Codes. Their authors designed these laws "to restrict the liberties of the newly freed slaves to ensure a supply of inexpensive agricultural labor and to[, unfortunately,] maintain white supremacy." BLACK'S LAW DICTIONARY 163 (7th ed. 1999) (defining "Black Codes"). In a post-slavery America, some could not part with the institution of slavery, and insisted on creating a new system that would parallel the old and maintain a subordinate caste. *Developments in the Law - Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 40 (1980). In this historical context, one could argue that

Section 1981 was intended to wipe out the Black Codes and the vestiges of slavery.

Nearly one hundred years later, America was in the midst of the Civil Rights Movement. While this movement was largely designed to promote equality among the races, it can be credited with a much broader effect. In particular, the Civil Rights Movement spawned Congress' creation of a revolutionary statutory scheme in Title VII, which, among other things, protects against: (1) discrimination based on an individual's "race, color, religion, sex, or national origin" in the employment context, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(a)(2); and (2) an employer's retaliation against an employee for engaging in protected activity such as "making charges, testifying, assisting, or participating in enforcement proceedings" under Title VII, 42 U.S.C. § 2000e-3(a).

In Title VII, Congress created the Equal Employment Opportunity Commission (hereinafter "EEOC") to enforce Title VII's protections against employment discrimination and retaliation. *See* 42 U.S.C. § 2000e-4 (2006). Congress also created specific requirements for filing claims against employers alleging discrimination or retaliation, namely: (1) an individual must bring a charge of discrimination before the EEOC within 180 days of the discriminatory act, 42 U.S.C. § 2000e-5(e)(1); (2) where an employee initiates a charge with a state agency, he/she must file the charge with the EEOC within 300 days of the alleged unlawful employment practice, *id.*; and (3) once the EEOC issues a right to sue letter to the aggrieved individual, he/she must file suit within 90

days or forever be barred from bringing a claim alleging employment retaliation or discrimination, *id.* at § 2000e-5(f)(1).

In 1991, Congress amended both Section 1981 and Title VII. The Civil Rights Act of 1991 specifically amended Section 1981 to include subsection (b), which defines the phrase "make and enforce contracts" to include only "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

The Civil Rights Act of 1991 amended Title VII by including 42 U.S.C. § 2000e-2(k) (2006), which establishes the burden of proof in disparate impact discrimination cases. Congress also created the right to a jury trial when litigating disputes under Title VII. *See* 42 U.S.C. § 1981a(c) (2006).

From 1866 to the present, not once has Congress amended Section 1981 to include a cause of action based on retaliation as it has done in numerous statutes throughout history. *Compare* 42 U.S.C. § 1981, *with* 29 U.S.C. 158(a)(4) (2006), 29 U.S.C. § 215(a)(3) (2006), 42 U.S.C. § 2000e-3(a) (2006), 29 U.S.C. § 623(d) (2006), 42 U.S.C. § 12203(a) and (b) (2006), 29 U.S.C. § 2615 (2006), 38 U.S.C. § 4311(b) (2006), *and* 49 U.S.C. § 31105 (2006).

II. FACTUAL BACKGROUND

Petitioner operates a restaurant chain known as "Cracker Barrel" in a number of states. It employed Respondent as an associate manager in one of its

restaurants. JA 82. Petitioner discharged Respondent on December 5, 2001 after another associate manager complained that Respondent left the store's safe open during the evening hours in violation of his responsibilities. JA 109.

Respondent, who is African-American, challenged his termination by filing an EEOC charge on August 9, 2002. JA 37, 55. Respondent did not check the box on his EEOC charge denoting retaliation under Title VII. JA 37, 55. On March 3, 2003, the EEOC issued a right to sue letter advising Respondent that he had 90 days in which to file a lawsuit (*i.e.*, until June 5, 2003). JA 83. Respondent, however, did not file his complaint until January 12, 2004, 221 days after June 5, 2003. JA 84, 91 (while January 12, 2004 was 221 days after June 5, 2003, the Court noted that Respondent was 195 days tardy in filing his lawsuit against Petitioner).

III. LOWER COURT PROCEEDINGS

On January 12, 2004, Respondent filed his complaint against Petitioner in the United States District Court for the Northern District of Illinois seeking relief for racial discrimination and retaliation under both Title VII and Section 1981. JA 86-87. In response to Petitioner's Motion to Dismiss, the District Court dismissed Respondent's Title VII discrimination and retaliation claims because he failed to file those claims within 90 days of receiving his right to sue letter. JA 91-92.

After the Court's decision, Respondent's only remaining claims were his Section 1981 discrimination and retaliation claims. JA 109-110. Following

discovery, Petitioner filed a Motion for Summary Judgment. JA 108. In response to the motion, Respondent abandoned his Section 1981 discrimination claim. JA 115 (noting that it became "apparent from the presentation [Respondent made] in his opposition papers" that Respondent's retaliation claim was the only claim that had "any vitality"). The District Court granted Petitioner's Motion, holding that Respondent could not establish a *prima facie* case of retaliation. JA 113-116.

Respondent then appealed his case to the Seventh Circuit Court of Appeals with respect to his Section 1981 claims. JA 117-118. In opposition, Petitioner argued, *inter alia*, the following: (1) a new decision from the Seventh Circuit precluded Respondent from even bringing a retaliation claim under Section 1981, *see Hart v. Transit Mgt. of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005); and (2) assuming that Respondent had a viable Section 1981 retaliation claim, he could not establish a *prima facie* case of retaliation against Petitioner. *See* JA 117-166 *generally*.

On appeal, the Seventh Circuit overruled its decision in *Hart* and ruled in favor of Respondent. JA 146, 149 n. 12. It held that Section 1981 provides for a cause of action based on retaliation:

> [T]he issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the "termination of contracts," and there can be no doubt that a retaliatory

> discharge is indeed a termination of the employment contract. . . . [T]he legislative history confirms that Congress intended retaliation to be included within section 1981.

JA 137-138. Of particular import, the Seventh Circuit disclaimed its duty to "harmonize" Section 1981 and Title VII, despite the statutes' partial overlap. JA 145.

SUMMARY OF ARGUMENT

One of the lasting principles of the American Revolution is the idea that "laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, Editorial, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24. Indeed, this principle has become accepted all over the world, even in countries where the principle is not actually practiced. *Id.* This case is of paramount importance for the protection of this principle in the United States. This case is not about taking a remedy away from Respondent or anyone else who is retaliated against for complaining about racial discrimination in the workplace. That remedy already exists in Title VII of the Civil Rights Act of 1964. This case is about respect for and proper construction of the laws Congress, as the elected representatives of the people, enacts.

The sole legal issue presented in this case is whether a retaliation claim is cognizable under 42 U.S.C. § 1981. This Court should reverse the Seventh Circuit Court of Appeals and hold that Section 1981 does not recognize a cause of action based on retaliation because: (1) the plain language of Section

1981 does not provide for a cause of action based on retaliation; (2) proper application of statutory construction shows that Congress intended to exclude retaliation from Section 1981; (3) the Seventh Circuit misused legislative history to create a cause of action under Section 1981 where none exists in the text of the statute; (4) the Seventh Circuit erroneously relied on this Court's decisions in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), to support its decision; and (5) public policy demands reversal.

Absent any textual support, the Seventh Circuit improperly created a cause of action based on retaliation under Section 1981. This unauthorized creation poses a danger to the long-standing jurisprudence of this Court, holding that when a statute's language is plain, the only function of any court is to enforce the statute according to its terms. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1927); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1894); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

By creating a cause of action for retaliation under Section 1981, the Seventh Circuit has, in effect, drafted, passed, and executed legislation without concern for the democratic norms embodied in the Constitution, particularly the separation of powers. *See* U.S. CONST. ARTS. I, II, & III. *See also* THE

FEDERALIST NO. 78, at 401-02 (Alexander Hamilton) (Phoenix Press Paperback ed., 2000) ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.") (capitalization in original).

The Seventh Circuit ignored the plain language of Section 1981 and Congress' intentional exclusion of a cause of action based on retaliation in Section 1981. Historically, when Congress has wished to create such a cause of action in an anti-discrimination statute, it has explicitly done so. Congress did not include an anti-retaliation provision in Section 1981, and courts are not free to create rights and remedies beyond those set forth in the text that Congress has chosen to enact.

The Seventh Circuit's decision threatens to eviscerate the administrative and procedural safeguards of Title VII that Congress specifically enacted to govern claims of race discrimination and retaliation in the employment context. *See* 42 U.S.C. § 2000e, *et seq*, ("Title VII"). This, by itself, tips the scales in favor of Petitioner's position.

Finally, the Seventh Circuit's decisions to (1) improperly infer a cause of action based on retaliation from the legislative history alone, (2) erroneously rely on the Court's opinions in *Sullivan* and *Jackson*, and (3) ignore proper public policy concerns support Petitioner's argument.

For these reasons, the Court should reverse the Seventh Circuit's decision and hold that Section 1981 does not provide for a cause of action based on retaliation.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 1981 DOES NOT PROVIDE FOR A CAUSE OF ACTION BASED ON RETALIATION.

The text of Section 1981, like all other statutes, only protects specific rights. At its core, Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (quoting 42 U.S.C. § 1981(a)). In the Civil Rights Act of 1991, Congress defined the phrase "make and enforce" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Even though amended, an employer's conduct is not actionable under Section 1981's text unless it is "racially motivated." *Runyon v. McCarey*, 427 U.S. 160, 168 (1976). Courts cannot disregard Congress' express language and create a cause of action based on retaliation where none exists in the statute. The fact of the matter is that the plain language of Section 1981 does not contain the word "retaliation" or any wording that one could legitimately construe as an anti-retaliation clause. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (the congressionally created anti-retaliation clause in Title VII).

It is well established that "when [a] statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6; *Ron Pair Enter.*, 489 U.S. at 241; *Caminetti*, 242 U.S. at 485. *See also Burlington N. & Santa Fe Ry. Co. v. White*, __ U.S. __, 126 S. Ct. 2405, 2412 (2006) (analyzing Title VII and noting that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of certain words and phrases in statutes) (Breyer, J.) (internal citation omitted); *Lamie*, 540 U.S. at 542 ("If Congress enacted into law something different from what it intended, then [Congress] should amend the statute to conform it to its intent.") (Kennedy, J.); *Bedroc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires [the Court] to 'presume that the legislature says in a statute what it means and means in a statute what it says.'"). *See also* THE FEDERALIST NO. 78, *supra*, at 401-02. The Founding Fathers invested the legislative power of the United States Government in Congress alone. U.S. CONST. ART. I, § 1. They did not give the judiciary the power to unilaterally create laws or draft statutory language where Congress declined to do so. The judiciary must respect the statutory language Congress enacts.

Indeed, this Court has, in the past, respected and relied on the plain language of Section 1981 when analyzing its text. *See Domino's Pizza*, 546 U.S. at 479-80 (holding that commensurate with the "plain text of the statute," an individual "cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he

wishes 'to make and enforce'") (Scalia, J.); *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (applying a textualist analysis to Section 1981 and limiting Section 1981 to its text) (Kennedy, J.).

Section 1981's plain language is clear. Congress never used the word "retaliation" or a derivative thereof in its text. Nor did Congress articulate in any way that a party can bring a cause of action under Section 1981 based on retaliation as it did in Title VII. *Compare* 42 U.S.C. § 1981, *with* 42 U.S.C. § 2000e-3(a). In fact, not one word in Section 1981 can be interpreted as including retaliation. *See* THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 1377 (Clarendon Press 1991) (defining "termination" to mean "the act of terminating. . . . an end or extremity; close or conclusion. . . . an ending of employment with a specific employer"); *id.* at 320 (defining "make" to mean "to draw up; draft. . . . to agree upon [or] arrange"); *id.* at 442 (defining "enforce" to mean "to put or keep in force; compel obedience to"); *id.* at 127 (defining "benefit" to mean "something that is advantageous or good"); *id.* at 1074 (defining "privilege" to mean "a right, immunity, or benefit enjoyed by a particular person or a restricted group of persons. . . . any of the rights common to all citizens under a modern constitutional government"). *Cf. id.* at 1233 (defining "retaliate" to mean "repay an injury, insult, etc., in kind; attack in return; make reprisals").

There is a distinct difference between denying an individual the equal right to "make and enforce contracts" without respect to his/her race, and retaliating against that same person because he/she complained about discrimination. *See Burlington N.*,

126 S. Ct. at 2412 (noting a distinction between discrimination and retaliation in Title VII – "[t]he substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.") (Breyer, J.); *Jackson*, 544 U.S. at 185 ("[a] claim of retaliation is not a claim of discrimination on the basis of [race]") (Thomas, J., dissenting). The common meaning of the words "discriminate" and "retaliate" demonstrates the distinction. *Compare* THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 411 (Clarendon Press 1991) (defining "discriminate" to mean "make a distinction, esp. unjustly and on the basis of race, colour, or sex"), *with id.* at 1233 (defining "retaliate" to mean "repay an injury, insult, etc., in kind; attack in return; make reprisals").

Disregarding these principles, the Seventh Circuit held that "[t]he plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the 'termination of contracts,' and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract." JA 137. The Seventh Circuit, however, ignored the fact that to be actionable under Section 1981, the plain language of the statute requires that a termination of a contractual relationship occur in such a way as to deny an individual rights that are otherwise enjoyed by white citizens, or because of that individual's race – not just a termination in the abstract. *See Domino's Pizza*, 546 U.S. at 474 (holding that Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race").

In this case, Respondent bases his claim under Section 1981 on Petitioner's alleged response to his conduct (*i.e.*, the fact that he complained about racial discrimination), not his status (*i.e.*, the fact that he is African-American). Congress, however, only provided protection under Section 1981 based on an individual's status (*i.e.*, race/color). *See* 42 U.S.C. § 1981. *See also Domino's Pizza*, 546 U.S. at 474 (holding that Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race"). By contrast, in Title VII, Congress explicitly created a cause of action when an employer retaliates against an employee who engaged in clearly defined protected activity. *See, e.g.*, 42 U.S.C. § 2000e-3(a).

This Court should reverse the Seventh Circuit's decision in this case because Section 1981's plain language does not provide for a cause of action based on retaliation.

II. CONGRESS INTENDED TO EXCLUDE A CAUSE OF ACTION BASED ON RETALIATION FROM SECTION 1981 WHEN IT DRAFTED AND AMENDED IT.

The text of Section 1981 is clear, and further analysis is unnecessary. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, __ U.S. __, 127 S. Ct. 1534, 1543 (2007) ("[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis."); *Bedroc Limited*, 541 U.S. at 183 ("The preeminent canon of statutory interpretation requires [the Court] to 'presume that the legislature says in a statute what it means and means in a statute what it says.'").

Nonetheless, several well-established principles of statutory construction additionally illustrate Congress' intent to exclude a cause of action based on retaliation from Section 1981: (1) Congress has historically included specific anti-retaliation clauses in anti-discrimination statutes, but it purposely did not include such a clause when it amended Section 1981 in 1991; (2) when Congress amended Section 1981, Congress knew that courts would analyze Section 1981 based on its plain text and not read an anti-retaliation clause into that text; and (3) Congress does not intend general statutes like Section 1981 to subsume specific statutes like Title VII.

A. Congress Exhibited Its Intent To Exclude A Cause Of Action Based On Retaliation From Section 1981 By Including Such Protection In Similar Anti-Discrimination Statutes, But Excluding It From Section 1981.

Before and after it passed the Civil Rights Act of 1991, Congress expressed its intent to include specific anti-retaliation clauses in statutes where it intended to provide for such a cause of action. In 1991, however, Congress specifically chose to exclude an anti-retaliation provision from Section 1981.

This Court has held that where "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of certain clauses in statutes, it is not the role of the Court to intrude upon that deliberate decision. *Russello v. United States*, 464 U.S. 16, 23 (1983). *See also Burlington N.*, 126 S. Ct. at 2412 (analyzing Title VII and citing the same principle of

law) (Breyer, J.). This principle applies where the Court looks at internal statutory conflicts, as well as situations, like the present, where Congress has specifically excluded a statutory provision from one statute that it often times includes in similar statutes. *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83 (1991).

In *Casey*, 499 U.S. at 84, the Court addressed the issue of whether expert witness fees shift to the losing party in civil rights litigation "pursuant to 42 U.S.C. § 1988, which permits the award of 'a reasonable attorney's fee.'" The Court undertook an extensive statutory analysis, which led to the following:

> The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost. While some fee-shifting provisions, like § 1988, refer only to "attorney's fees," *see, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), many others explicitly shift expert witness fees *as well as* attorney's fees. . . .
>
> . . . At least 34 statutes in 10 different titles of the U.S. Code explicitly shift attorney's fees and expert witness fees . . . .
>
> * * *
>
> We think this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as [Petitioner] argues, the one includes the other, dozens of

> statutes referring to the two separately become an inexplicable exercise in redundancy.

Id. at 88-92.[1]

Despite this Court's direction in *Casey*, when the Seventh Circuit held in this case that Congress intended Section 1981 to encompass retaliation, it effectively held that Congress infused numerous anti-discrimination statutes with superfluous anti-retaliation provisions.

Both before and after the 1991 amendments to Section 1981, where Congress decides to protect against retaliation, Congress has consistently inserted anti-retaliation clauses into anti-discrimination laws and other statutes. *See, e.g.*, 29 U.S.C. 158(a)(4) (anti-retaliation provision in National Labor Relations Act, enacted in 1935 and amended to include anti-retaliation clause in 1947); 29 U.S.C. § 215(a)(3) (anti-retaliation provision in Fair Labor Standards Act, enacted in 1938); 42 U.S.C. § 2000e-3(a) (anti-retaliation provision in Title VII, enacted in 1964); 29 U.S.C. § 623(d) (anti-retaliation provision in Age Discrimination in Employment Act, enacted in 1967); 42 U.S.C. § 12203(a) and (b) (anti-retaliation provision in Americans with Disabilities Act, enacted in 1990); 29 U.S.C. § 2615 (anti-retaliation provision in Family

---

[1] While Congress later amended the text of 42 U.S.C. § 1988 to allow recovery for both attorney's fees and expert fees, *see* 42 U.S.C. § 1988(c) (2006), the analytical framework of *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991), is still authoritative. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, __ U.S. __, 126 S. Ct. 2455 (2006).

and Medical Leave Act, enacted in 1993); 38 U.S.C. § 4311(b) (anti-retaliation provision in Uniformed Services Employment and Reemployment Act, enacted in 1994); 49 U.S.C. § 31105 (anti-retaliation provision in Surface Transportation Assistance Act of 1982, amended in 1994 to protect against retaliation).

Of particular importance, in 1990, just one year prior to the Civil Rights Act of 1991, Congress chose to include an anti-retaliation clause in the Americans with Disabilities Act. *See* 42 U.S.C. § 12203(a) and (b). And, in 1993, just two years after the Civil Rights Act of 1991, Congress chose to use a similar anti-retaliation clause in the Family and Medical Leave Act. *See* 29 U.S.C. § 2615. But, in drafting and implementing amendments to Section 1981 in the Civil Rights Act of 1991, Congress specifically excluded such a provision.

By concluding that Congress intended to protect against retaliation in Section 1981, the Seventh Circuit made Congress' decisions to enact anti-retaliation clauses in many other federal statutes superfluous. Such a result is contrary to this Court's previous holdings that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory provisions. *See Russello*, 464 U.S. at 23; *Burlington N.*, 126 S. Ct. at 2412; *Casey*, 499 U.S. at 88-92.

Accordingly, this Court should reverse the Seventh Circuit on the grounds that Congress specifically decided not to recognize a cause of action based on retaliation under Section 1981.

B. Congress Exhibited Its Intent To Exclude Retaliation From Section 1981 Because It Knew Courts Would Only Analyze The Actual Language Of Section 1981.

When Congress drafted the Civil Rights Act of 1991, amending Section 1981, Congress was operating under the assumption that the judiciary would analyze Section 1981 based on its text. Thus, if Congress intended Section 1981 to provide for a cause of action based on retaliation, it would have provided for such a remedy in the statutory text of Section 1981.

In 1989, this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Kennedy, J.), in which it addressed the issue of whether a racial harassment claim exists under Section 1981. The Court answered this question in the negative, holding that Section 1981 protects only what the text says it protects, namely the right to make and enforce contracts. *Id.* at 176. The Court found that the first right (*i.e.*, the right to make contracts) "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contractual relationship has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177. The Court found that the second right (*i.e.*, the right to enforce contracts) was also narrowly and literally construed only to "prohibit[] discrimination that infects the legal process in ways that prevent one from enforcing contract rights." *Id.* Accordingly, the Court analyzed Section 1981 based on its text, which only protects an individual's equal right "to 'make and

enforce contracts' without respect to race." *See Domino's Pizza*, 546 U.S. at 474.

Two years later, in 1991, Congress amended Section 1981, the very statute at issue in *Patterson*. At that point in time, the Court had made abundantly clear to Congress that it would look to the specific statutory language when interpreting statutes. Beginning with *Cort v. Ash*, 422 U.S. 66 (1975), and continuing through *Rodriguez v. United States*, 480 U.S. 522 (1987), and ultimately *Patterson*, the Court made explicitly clear that it would not independently search out Congress' subjective intent where the statute did not require such an effort. *See* JA 163-164 (Easterbrook, J., dissenting) (noting that in 1975, the Court began "lash[ing] [statutory] interpretations more closely to the statutory text"). Congress was aware of the Court's analytical framework in 1991 and would have specifically provided for a cause of action based on retaliation under Section 1981, if it truly intended to afford individuals such relief under Section 1981.

Since the text of Section 1981 clearly does not provide for a cause of action based on retaliation, the Seventh Circuit focused its opinion on a portion of the legislative history and the alleged necessity for such a cause of action under Section 1981. JA 138-145 (addressing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) and legislative history). In doing so, the Seventh Circuit erroneously engaged in statutory interpretations well beyond the statutory text of Section 1981, and contrary to this Court's established statutory analysis.

Accordingly, this Court should reverse the Seventh Circuit's decision because it ignored the Court's analytical framework concerning statutes and Congress' intent to exclude a cause of action based on retaliation from Section 1981.

C. General Statutes Like Section 1981 Do Not Subsume Detailed Statutes Like Title VII.[2]

It is axiomatic that "a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1964) (quoting *Townsend v. Little*, 109 U.S. 504, 512 (1883)). *See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, __ U.S. __, 127 S. Ct. 2518, 2532 (2007) ("a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions . . .") (internal citation omitted); *Morton v. Mancari* 417 U.S. 535, 550-51 (1974) (holding that a specific statute is not to be

---

[2] While it could be argued that Section 1981 should not apply in the employment context due to Congress' specific enactment of Title VII and its application to employment discrimination and retaliation, for purposes of this brief, Petitioner only addresses whether a retaliation claim exists under Section 1981.

"controlled or nullified" by a general statute); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) (noting that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling"). With respect to Section 1981 and Title VII, this Court has even stated that because "egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII)," courts should be loath "to twist the interpretation of another statute (§ 1981) to cover the same conduct." *Patterson*, 491 U.S. at 181.

In *Patterson*, the Court decided that if it were to interpret Section 1981 too broadly, it would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims." *Patterson*, 491 U.S. at 180.[3] The Court realized that "[i]n Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation." *Id.* It found that "Section 1981, by contrast, provides no administrative review or opportunity for conciliation." *Id.* The existence of Title VII nullifies any argument that Section 1981 should be read to include retaliation, at

---

[3] While *Patterson*'s holding that post-formation conduct is not actionable under Section 1981 is no longer in effect due to the subsequent enactment of 42 U.S.C. § 1981(b), the remainder of the Court's decision in *Patterson* provides an appropriate basis for determining the correct legal and analytical approach to Section 1981's interaction with Title VII.

least in the employment context, because Title VII already provides for that protection.

In May of 2007, this Court again asserted that "it is not [the Court's] prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination' and the interest in repose." *Ledbetter v. The Goodyear Tire & Rubber Co., Inc.*, __ U.S. __, 127 S. Ct. 2162, 2177 (2007) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)). *Ledbetter* presented the Court with the opportunity to judicially extend one of Title VII's filing deadlines, but the Court stated that it "must 'give effect to the statute as enacted'" in order to avoid usurping Congress' legislative authority. *Id.* at 2170 (internal citation omitted). The Court refused, as it has repeatedly, to "extend or truncate Congress' deadlines." *Id.* It held that Title VII's "short deadline[s] reflect[] Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 2170-71 (citing *Occidental Life Ins. of Cal. v. EEOC*, 432 U.S. 355, 367-68 (1977)). In *Ledbetter*, the Court reinforced the importance of Title VII's administrative and procedural mechanisms concerning employment discrimination and retaliation, which were clearly articulated by Congress.

As in *Patterson*, this Court is now presented with the following two statutes: (1) Title VII, specifically addressing discrimination and retaliation in the employment context; and (2) Section 1981, addressing the equal right to make and enforce contracts regardless of an individual's race.

Title VII's specific provisions protect against unlawful employment practices, which include: (1) discriminating against an individual in the employment relationship "because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. §§ 2000e-2(a)(1) and 42 U.S.C. § 2000e-2(a)(2); and (2) retaliating against an employee for engaging in protected conduct such as "making charges, testifying, assisting, or participating in enforcement proceedings" under Title VII, 42 U.S.C. § 2000e-3(a).

Title VII further requires that an individual bring a charge of discrimination before the EEOC within 180 days of the discriminatory act. 42 U.S.C. § 2000e-5(e)(1). Where an employee initiates a charge with a state agency, he/she must file the charge with the EEOC within 300 days of the alleged unlawful employment practice. *Id.* Once the EEOC issues a right to sue letter to the aggrieved individual, he/she must file suit within 90 days or forever be barred from bringing a claim alleging employment retaliation or discrimination. *Id.* at § 2000e-5(f)(1). Another unique aspect of Title VII is that Congress chose to cap compensatory and punitive damages available to plaintiffs in employment discrimination and retaliation cases. *See* 42 U.S.C. § 1981a(b)(3) (2006).

In comparison, Section 1981, as enacted in 1866 and later amended in 1991, protects the equal right to make and enforce contracts without respect to race. Section 1981 lacks all of the administrative and procedural mechanisms present in Title VII. While Congress did not specifically articulate a statute of limitations in Section 1981, the Court has held that 28 U.S.C. § 1658 creates a four-year statute of limitations

for Section 1981. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372 (2004). Furthermore, Congress chose not to limit compensatory and punitive damages under Section 1981.

Per this Court's previous holdings, absent explicit intent, Congress could not have intended to destroy Title VII's specific administrative and procedural mechanisms governing discrimination and retaliation in the employment relationship when it amended Section 1981 in 1991. *See Radzanower*, 426 U.S. at 153. *See also Ledbetter*, 127 S. Ct. at 2170-71 (noting the importance of Title VII's statutes of limitations). The extra delay in resolution of disputes under Section 1981 as compared to Title VII – upwards of four years based on *R.R. Donnelley & Sons* – will add significant costs and delay to litigation of employment claims, contrary to the intent of Congress set forth in Title VII.

The practical effect of the Seventh Circuit's decision in the case at bar is that Section 1981 will provide an identical cause of action to Title VII, but without any of the congressionally-mandated procedural and administrative requirements of Title VII. As the District Court properly found, Respondent failed to file his case in a timely manner after he received a right to sue letter from the EEOC. JA 91-92. Yet, if this Court affirms the Seventh Circuit's decision, Respondent's non-compliance with Title VII's congressionally-mandated statutes of limitations is irrelevant because he, and any other employee similarly situated, can still bring a cause of action for retaliation against his employer under Section 1981. If this Court does not reverse the Seventh Circuit and hold that a cause of action based on retaliation does not exist under

Section 1981, it will be implying that the congressionally-created statutes of limitations in Title VII are irrelevant in employment discrimination and retaliation cases related to race, directly contradicting this Court's holding in *Ledbetter*. *See generally Ledbetter*, 127 S. Ct. 2162.

As Judge Easterbrook wrote in dissent below, Respondent "is not the first . . . disgruntled employee [who] turned to § 1981 after missing the deadline for litigation under Title VII." JA 160. If the Court affirms the Seventh Circuit's decision, he will certainly not be the last to do so.

Accordingly, because Congress drafted Title VII and created the EEOC to address retaliation claims in the employment context, the general language of Section 1981 cannot be read to obliterate Title VII's procedural and administrative safeguards. The Court should therefore reverse the Seventh Circuit's decision in this case.

III. LEGISLATIVE HISTORY CANNOT BE USED TO CREATE A CAUSE OF ACTION BASED ON RETALIATION UNDER SECTION 1981 WHEN THE STATUTE IS CLEAR.

This Court has long held that where the statutory language is plain, resorting to legislative history is unnecessary. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.) ("The authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) ("we do not resort to legislative history to cloud a statutory

text that is clear"). *See also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, __ U.S. __, 126 S. Ct. 2455, 2463 (2006). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotations omitted) (Thomas, J.). The text is preferred over legislative history because the latter is unreliable and often misleading.

Despite the plain language of Section 1981 and principles of statutory construction showing that it does not provide for a cause of action based on retaliation, the Seventh Circuit heavily relied on part of the legislative history surrounding the Civil Rights Act of 1991 to support its conclusion that such a cause of action must be read into the statute. *See* JA 138 (noting that "the legislative history confirms that Congress intended retaliation to be included within Section 1981"). Many other courts have made similar assertions in error. *See, e.g., Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) (recognizing a claim under Section 1981 because "[l]egislative history supports the view that this definition was intended to encompass both a race-based failure to promote and retaliation for a complaint of such a failure to promote"); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411, n. 12 (11th Cir. 1998) (citing lower court opinions and legislative history in support of a claim of retaliation under Section 1981); *Thomas v. Exxon, U.S.A.*, 943 F. Supp. 751, 762 (S.D. Tex. 1996) *aff'd*, 122 F.3d 1067 (5th Cir. 1997) (citing legislative history in support of recognizing a claim of retaliation under Section 1981);

Adams v. City of Chicago, 865 F. Supp. 445, 446 (N.D. Ill. 1994) (recognizing a claim of retaliation under Section 1981 because "[t]he legislative history makes Congress' intent clear . . .").

The legislative history that purportedly evinces Congress' intent consists of a single excerpt from a House Committee Report. That excerpt provides that "[t]he Committee intends this provision [42 U.S.C. § 1981(b)] to bar all race discrimination in contractual relations . . .[, which] would include but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." H.R. REP. NO. 102-40, pt. 2, at 72 (1991).[4]

---

[4] The alleged types of "race discrimination" listed in the legislative history do not relate to one another. In particular, "retaliation" does not relate to the other terms. "Retaliation" describes the motive behind an action, whereas "harassment," "discharge," "demotion," "promotion," "transfer," and "hiring" are specific employment actions. When Congress protects against retaliation, as it did in Title VII, it does so by describing the activities for which an employee receives protection. *See, e.g.*, 42 U.S.C. § 2000e-3(a). "Retaliation" standing alone does not mean anything in the employment context because to be liable for retaliation, there must be a defined protected activity against which an employer retaliates. Congress has not defined such activities in the context of Section 1981. Accordingly, an employer cannot be held liable under Section 1981 for retaliation. Additionally, employees already receive protection, under Title

In related legislative history, the Senate Committee on Labor and Human Resources prepared a report in 1990 addressing an identical amendment to that adopted by the full Congress in 1991 and codified at 42 U.S.C. § 1981(b). Therein, the Committee stated:

> The Act would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b) that would make it clear that the right to "make and enforce contracts" free from race discrimination protected by Section 1981 includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The Committee intends this provision to bar all race discrimination in contracts. The list set forth in the subsection (b) added by the Act is intended to be illustrative rather than exhaustive.

S. REP. NO. 101-315, at 45 (1990). Nowhere did the Senate Committee mention retaliation like the House Committee.

Thus, legislative history can lead jurists to mistakenly believe "that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole – so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has

---

VII, against each thing listed in this legislative history. *See supra* Section II(C).

expressed' thus-and-so." *Zedner v. United States*, __ U.S. __, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring). Legislative history provides courts the opportunity to add language to a statute that a majority of the legislature did not approve, while at the same time hiding behind assertions that "Congress" actually approved a statement when only a committee approved the statement, not Congress.

In the case of Section 1981(b), the House Committee Report is not even in accord with a Senate Committee Report addressing the same statutory language. *Compare* H.R. REP. NO. 102-40, pt. 2, at 72 (1991), *with* S. REP. NO. 101-315, at 45 (1990). The full Congress cannot be said to have adopted either of these Reports in place of the specific language used in the actual statute. This is exactly why the statutory language is controlling.

Striking an even deeper blow to democratic values and the constitutional separation of powers, reliance on legislative history gives "unelected staffers and lobbyists . . . both the power and the incentive to attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon Mobil*, 545 U.S. at 568 (also noting that "investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends") (internal quotations omitted). Put simply, the use of legislative history enables unelected individuals the opportunity to alter legislation behind the scenes without presenting their proposals to Congress as a whole.

There is no better illustration of this problem than this case. As explained in Section II(A) above, this Court holds that where "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of certain clauses in statutes, it is not the role of the Court to intrude upon that deliberate decision. *Russello*, 464 U.S. at 23. *See also Burlington N.*, 126 S. Ct. at 2412 (analyzing Title VII and citing the same principle of law) (Breyer, J.); *Casey*, 499 U.S. at 88-92. Here, a legislator, staffer, lobbyist, or group thereof was apparently successful in having a House Committee Report mention that it was the intent of the House Committee for Section 1981(b)'s definition of "make and enforce contracts" to provide protection against retaliation in the employment context. *See* H.R. REP. NO. 102-40, pt. 2, at 72 (1991). However, he, she, or they never convinced a majority of Congress to amend Section 1981 to include a separate cause of action for retaliation or any other employment circumstance as it did in Title VII. These non-legislative expressions have now been used by courts like the Seventh Circuit to create a new cause of action that Congress never voted to enact.

Use of legislative history, especially where used to create a cause of action, is dangerous. Laws are rules adopted by elected officials that the body politic has agreed will govern the behavior of its members. The body politic can only operate in conformity with those rules if it knows what those rules are. The body politic cannot be expected to guess what Congress "intends" a law to mean by analyzing floor debates, committee reports, and all minutiae of legislative history. Members of the body politic must be able to look at a statute and decipher how they should act based on

what the statute says. Similarly, they should be aware of the consequences for violating any given statute. Where a particular statute does not provide for a cause of action based on retaliation, an employer cannot be held liable under that particular statute for retaliation. Laws/rules should not require the body politic to continually guess what its members can and cannot do simply because one individual put one line in a committee report that was not adopted by Congress. Employers and the public are entitled to predictability, clarity, and fair notice of any penalty a particular statute may impose. By placing such an onerous burden on citizens (requiring them to analyze all non-statutory minutiae reduced to writing by the Congress), it could be said that the Seventh Circuit acted like Emperor Nero, who is said to have posted his edicts high up on pillars so individuals could not easily read them. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Princeton University Press 1998) (noting Emperor Nero's practices).

The text thus retains primacy when interpreting federal statutes. Legislative history should not and cannot be consulted in the face of a clear and unambiguous text. *Ratzlaf*, 510 U.S. at 147. *See also Jones v. Bock*, __ U.S. __, 127 S. Ct. 910, 921 (2007) ("Whatever temptations the statesmanship of policymaking might suggest, the judge's job is to construe the statute – not make it better."); *Exxon Mobil*, 545 U.S. at 568 ("The authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). Section 1981 is no exception. *See Domino's Pizza*, 126 S. Ct. 1246

(interpreting Section 1981 from a textualist perspective).[5]

The Seventh Circuit ignored these basic tenets of Supreme Court jurisprudence and decided to fashion a remedy for retaliation under Section 1981 based on a select piece of legislative history, not based on Section 1981's actual text. Accordingly, this Court should reverse the Seventh Circuit's decision.

IV. THE SEVENTH CIRCUIT'S RELIANCE ON *SULLIVAN V. LITTLE HUNTING PARK, INC.* AND *JACKSON V. BIRMINGHAM BOARD OF EDUCATION* WAS ERRONEOUS BECAUSE THOSE CASES ARE DISTINCTLY DIFFERENT FROM THIS CASE.

The Seventh Circuit could not find support for its ultimate holding in the text of Section 1981. It resorted to a House Committee Report, which was not passed by the bicameral legislature nor signed by the President. To try to support its holding, the Seventh Circuit erroneously relied on two cases from this Court: (1) *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and (2) *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). *See* JA 126-128, 138-144. Neither *Sullivan* nor *Jackson* addressed Section 1981, and thus the Court's analysis in each is not determinative of this case. Additionally, neither case presented a similar statutory conflict to that in

---

[5] It is disingenuous for any lawyer or jurist to include language in a statute or contract that was proposed and/or discussed, but was not ultimately included in the statute or contract.

this case in which a general statute (*i.e.*, Section 1981) is being used by lower courts to eviscerate a specific statute (*i.e.*, Title VII).

A. *Sullivan v. Little Hunting Park, Inc.* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case.

In *Sullivan*, 396 U.S. at 234, the plaintiff, a white homeowner, sued a non-profit corporation created to operate a community park. The homeowner had a transferable membership interest in the corporation, entitling him to use the park. *Id.* He attempted to transfer his membership interest to an African-American homeowner, which, pursuant to the corporation's bylaws, required approval from its board of directors. *Id.* at 234-35. The board of directors refused to approve the transfer. *Id.* at 235. When the white homeowner protested, he was expelled from the corporation by the board of directors. *Id.* This Court ultimately addressed the issue of whether the white homeowner had standing to sue under 42 U.S.C. § 1982 (hereinafter "Section 1982") after being expelled from the corporation for advocating in favor of an African-American's rights. *Id.* at 237. Section 1982 protects all citizens' equal right "to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2006). Despite a lack of textual support, the Court found that the homeowner did have standing because absent his ability to sue, individuals would perpetuate "racial restrictions on property." *Sullivan*, 396 U.S. at 237. While not using the word "retaliate," this decision effectively created a

cause of action based on retaliation under Section 1982.

Sullivan must be viewed in light of the circumstances surrounding it. *See Jackson*, 544 U.S. at 176. When the Court decided *Sullivan* in 1969, the Court was engaging in a "freewheeling 'interpretation'" of statutory language and operating under the presumption that "judges [could] supplement statutes to make them 'more effective.'" JA 163-164 (Easterbrook, J., dissenting). As noted in Section II(B) above, beginning in 1975 with *Cort v. Ash*, 422 U.S. 66, and continuing with cases such as *Rodriguez v. United States*, 480 U.S. 522, in 1987, and many since then, the Court has changed its analytical framework and endorsed a system whereby courts "lash interpretations more closely to the statutory text." JA 163 (Easterbrook, J., dissenting). *See, e.g., Domino's Pizza*, 546 U.S. 470; *Lamie*, 540 U.S. 526; *Bedroc Limited*, 541 U.S. 176.

Congress' knowledge of this analytical change leads to the conclusion that if it was concerned about an anti-retaliation clause in Section 1981 when it amended it in 1991, Congress would have included such a clause so as to allow the courts to enforce one. *See supra* Section II (B). But, it did not.

Furthermore, unlike the case at bar, the Court in *Sullivan* did not have to address two overlapping statutes needing to be reconciled. *See supra* Section II(C). In *Sullivan*, the Court addressed 42 U.S.C. § 1982, which protects the right to freely "inherit, purchase, lease, sell, hold, and convey" property. Section 1982 does not enable an individual to ignore

otherwise applicable limitation periods in other statutes. As noted above, Section 1981, as erroneously interpreted by the Seventh Circuit, would permit such contravention of congressional mandates. *See supra* Section II(C).

Whereas the Court in *Sullivan* was not concerned with this predicament, the Seventh Circuit should have been. *See Morton v. Mancari*, 417 U.S. at 551 ("When there are two acts upon the same subject, the rule is to give effect to both if possible.") (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). But, the Seventh Circuit ignored its responsibilities and stated that it is not the role of the Court "to attempt to harmonize these statutes." JA 145 (referring to Section 1981 and Title VII). Simply put, the Seventh Circuit erred in its analysis of this case and should not have relied on *Sullivan* as it did.

The Seventh Circuit improperly applied *Sullivan* in reaching its conclusion in this case, and this Court should reverse its findings.

B. *Jackson v. Birmingham Board Of Education* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case.

In *Jackson*, 544 U.S. at 171, a public school teacher sued the Birmingham Board of Education, alleging that it violated 20 U.S.C. § 1681 *et seq.*, otherwise known as Title IX, by retaliating against him after he complained about sex discrimination in his school's athletic programs. Despite a lack of textual support, a majority of the Court held that Title IX's private

right of action encompasses claims for retaliation against an individual who complains about sex discrimination. *Id.* The Court relied, at least in part, on the fact that the word "discrimination" was sufficiently ambiguous to permit a reading of Title IX that included an anti-retaliation norm. *Jackson*, 544 U.S. at 173-74.

Like with *Sullivan*, however, the Court cannot ignore context. Title IX was enacted in 1972 when the Court was engaging in the "freewheeling interpretation" of statutory language noted above. *Jackson*, 544 U.S. at 176. The Court, in *Jackson*, stated that this timing provides "a valuable context for understanding [Title IX]." *Id.* Given that *Sullivan* is an example of the attitude of the Supreme Court just three years prior to the enactment of Title IX, it is reasonable to believe that Congress was aware of this when it enacted Title IX and would have expected Title IX to be interpreted in a substantially similar fashion. *Id.* at 176-77.

The same is not the case with respect to Section 1981 when it was amended in 1991. The Court's methodology for statutory analysis in 1991 was substantially different from that of the Court in 1972 when Congress enacted Title IX. In 1991, the Court had abandoned the approach that it took in cases such as *Sullivan*. The Court had begun "lash[ing] [statutory] interpretations more closely to the statutory text." JA 163 (Easterbrook, J., dissenting). *See also supra* Section II(B).

Also, as noted above concerning *Sullivan*, the Court in *Jackson* did not have to worry about potentially

eviscerating the comprehensive administrative and procedural schemes of a statue like Title VII. In *Jackson*, the Court only addressed Title IX, which protects against sex discrimination by recipients of federal education funding, and which does not overlap Title VII. *Jackson*, 544 U.S. at 173. Accordingly, just like in *Sullivan*, *Jackson* is inapplicable to the case at bar. The Court simply cannot ignore, as the Seventh Circuit did, its responsibility to reconcile Section 1981 and Title VII in this case. *See Morton*, 417 U.S. at 551. *See also supra* Section II (C).

The Court in *Jackson* additionally relied, at least in part, on the fact that the word "discrimination" in Title IX was sufficiently ambiguous to permit a reading of Title IX that included an anti-retaliation norm. *Jackson*, 544 U.S. at 173-74. Congress, however, did not use the term "discriminate" or "discrimination" anywhere in the text of Section 1981. Therefore, the Court's resolution of the ambiguity in the term "discrimination" does not apply to the case at bar.

There is one other crucial distinction in *Jackson*, namely that teachers and coaches were likely to be in the best situation to complain about discriminatory situations under Title IX. The Court reasoned that if they did not have an anti-retaliation provision to protect them, then the mandates of Title IX might not be achieved. *Jackson*, 544 U.S. at 181 ("sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools"). In the context of Section 1981 and employment, however, that is not the case. Complaining individuals like Respondent are already protected under Title VII. *See supra* Section II (C).

Accordingly, this Court's decision in *Jackson* is not applicable to the case at bar and the Seventh Circuit erred in using *Jackson* to buttress its conclusion.

V. PUBLIC POLICY DEMANDS THAT THIS COURT REVERSE THE SEVENTH CIRCUIT'S DECISION IN THIS CASE.

To read Section 1981 as the Seventh Circuit does creates a myriad of problems beyond its infidelity to the statutory text, principles of statutory construction, and case law described above.

First, the Seventh Circuit's decision dilutes Title VII and the importance of the EEOC. Since 1997, the EEOC has successfully conciliated over 4,000 disputes stemming from race-based charges. EEOC Charge Statistics, http://www.eeoc.gov/stats/race.html (last viewed Nov. 13, 2007). Approximately 25,000 more claims were resolved in other cooperative fashions. *Id.* Furthermore, over the past ten years, the number of charges alleging retaliation in violation of Title VII rose by nearly twenty percent. *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last viewed Nov. 13, 2007) (noting an increase in retaliation charges before the EEOC from 16,394 in 1997 to 19,560 in 2006). This demonstrates that employees understand that their remedy for retaliation claims in the workplace is through Title VII and the EEOC. If a cause of action for retaliation is deemed cognizable under Section 1981, there is no telling how many cases that could be successfully resolved by the EEOC through the mechanisms created by Congress in Title VII will instead end up clogging the judicial system.

Second, if more cases are brought before the courts instead of the EEOC, both employers and employees will be harmed. They will be deprived of the congressionally-mandated opportunity to settle claims without the added cost of litigation. *See Ledbetter*, 127 S. Ct. at 2170-71 (noting the importance of conciliation and cooperation in the resolution of employment disputes before the EEOC). Where the EEOC does not have the opportunity to conciliate employment disputes, employers can suffer greater harm to their public reputation, and they can potentially become liable for the employee's attorneys' fees at trial. *See* 42 U.S.C. § 2000e-5(k).

Third, the burden on the courts may be significant, and the courts will be forced to devote more of their limited resources to resolving disputes and discovery issues that should otherwise proceed through the EEOC. *See United States v. Dieter*, 429 U.S. 6, 8 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 204 (3d Cir. 2007) (noting the "burdens on the federal courts" caused by the "massive increase in the quantity of litigation in the federal courts for the last 30 years, far outpacing the growth in the size of the federal judiciary").

Fourth, the Seventh Circuit's decision results in a super-protected class created by the judiciary, not Congress. If this Court affirms the Seventh Circuit's decision, race/color will receive paramount protection in the employment context, protection beyond that level of protection afforded other protected classifications (*e.g.*, gender). Title VII created specific

statutes of limitations with which Respondent in this case did not abide. JA 91-92. However, because Respondent's claim involves alleged retaliation stemming from his alleged complaint about *racial* discrimination, the Seventh Circuit has held that he can still file a lawsuit against his former employer under Section 1981 up to four years after the alleged incident of retaliation. JA 136; *see Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372 (2004) (noting that 28 U.S.C. § 1658 creates a four-year statute of limitations for Section 1981). If a woman, on the other hand, is retaliated against for complaining about gender discrimination, she is relegated to the protections afforded her under Title VII alone. She, unlike Respondent, would have to file a charge before the EEOC within 180 days of the alleged retaliation. She, unlike Respondent, would also have to file a lawsuit within 90 days of receiving a right to sue letter from the EEOC.

Title VII was enacted to break the "glass ceiling" in our society that impeded certain groups in the workforce from succeeding. Congress, however, decided that all individuals protected under Title VII had to abide by Title VII's relatively short statutes of limitations for employment-related discrimination or retaliation. *See generally Ledbetter*, 127 S. Ct. 2162. Nonetheless, the Seventh Circuit now holds that those requirements do not apply if an individual's claim is somehow related to the color of his/her skin. This defies any normal reading of Section 1981 and Title VII, along with general principles of equality.

Finally, as argued throughout, this Court should not affirm the Seventh Circuit's disregard for

democratic norms. As Justice Scalia noted in 1999, the most important legal development in the past thousand years is "the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, Editorial, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24. The federal courts are staffed with many outstanding judges and justices. Not one of those judges or justices has been elected by the people. *See* U.S. CONST. ART. II, § 2. Nonetheless, as delineated above, the Seventh Circuit and other lower courts have acted as if they were elected by the people, independently creating a cause of action based on retaliation under Section 1981 out of whole cloth. *See* JA 136; *Hawkins*, 163 F.3d 684; *Andrews*, 140 F.3d 1405; *Thomas*, 943 F. Supp. 751; *Adams*, 865 F. Supp. 445. These courts have independently created a cause of action under Section 1981 where the people's representatives (*i.e.*, Congress) specifically chose not to. This represents a reversion to the days when judges whimsically created laws at their pleasure. This contravenes the Constitution and the separation of powers. This disregard for our chosen system of government cannot be upheld by this Court.

Accordingly, this Court should reverse the Seventh Circuit because its decision creates a myriad of practical and systemic problems in violation of public policy.

CONCLUSION

The judgment of the Seventh Circuit Court of Appeals should be reversed because: (1) the plain language of Section 1981 does not provide for a cause

of action based on retaliation; (2) proper application of statutory construction shows that Congress intended to exclude a cause of action based on retaliation from Section 1981; (3) the Seventh Circuit misused a portion of the legislative history to create a cause of action under Section 1981 where none exists in the text of the statute; (4) the Seventh Circuit erroneously relied on this Court's decisions in *Sullivan* and *Jackson* to support its opinion; and (5) public policy demands such a result. If this Court does not reverse the Seventh Circuit and hold that Section 1981 does not provide for a cause of action based on retaliation, any judge will be free to substitute his/her pleasure for the express intentions of Congress whenever the judge personally wishes the statute had been drafted differently or disagrees with how it was drafted by Congress.

Respectfully submitted,

MICHAEL W. HAWKINS
Counsel of Record
MICHAEL J. NEWMAN
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

MICHAEL ZYLSTRA
General Counsel and Vice President
CBOCS, West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, Tennessee 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

Counsel for Petitioner CBOCS West, Inc.

Date: November 14, 2007

57362

No. 06-1431

Supreme Court, U.S.
FILED
DEC 27 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

ERIC SCHNAPPER
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, Washington 98185
(206) 616-3167

CAROLYN SHAPIRO
CHICAGO-KENT COLLEGE OF LAW
ILLINOIS INSTITUTE OF TECHNOLOGY
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5392

CYNTHIA H. HYNDMAN
Counsel of Record
ALEEZA M. STRUBEL
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 663-3100

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a race retaliation claim cognizable under 42 U.S.C. § 1981?

TABLE OF CONTENTS

	Page
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
A. Statutory Background	2
B. Factual And Procedural Background	3
SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. RETALIATION FOR THE EXERCISE OF SECTION 1981 RIGHTS VIOLATES THE STATUTE	15
A. Section 1981 Forbids Reprisals Against Individuals For Exercising The Substantive Rights The Statute Protects	15
B. The Conduct For Which Humphries Was Fired Constituted An Exercise Of His Section 1981 Rights	24
II. SECTION 1981 FORBIDS RACE-BASED RETALIATION	31
III. SECTION 1981 FORBIDS DISCRIMINATION AGAINST AN EMPLOYEE FOR OPPOSING RACIAL DISCRIMINATION PROHIBITED BY THE STATUTE	35
IV. NEITHER SECTION 1981 NOR TITLE VII SHOULD BE NARROWLY CONSTRUED FOR THE PURPOSE OF AVOIDING ANY OVERLAP BETWEEN THE TWO STATUTES	40

TABLE OF CONTENTS – Continued

Page

V. THE CIVIL RIGHTS ACT OF 1991 RESTORED SECTION 1981's BROAD PROTECTION AGAINST RETALIATION..... 48

CONCLUSION 55

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 13, 41, 44

Andrews v. Lakeshore Rehabilitation Hospital, 140 F.3d 1405 (11th Cir. 1998) 9, 34, 49

Bailey v. Alabama, 219 U.S. 219 (1911) 11, 22, 23

Benson v. Little Rock Hilton Inn, 742 F.2d 414 (8th Cir. 1984) 50

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 30, 31

Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006) 15, 25

Burnett v. Grattan, 468 U.S. 42 (1984) 41, 42

Cannon v. University of Chicago, 441 U.S. 677 (1979) 38

Choudhury v. Polytechnic Institute of N.Y., 735 F.2d 38 (2d Cir. 1984) 50

Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006) 47

English v. General Development Corp., 717 F. Supp. 628 (N.D. Ill. 1989) 52

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 30, 31

Foley v. University of Houston System, 355 F.3d 333 (5th Cir. 2003) 49

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) 25

TABLE OF AUTHORITIES – Continued

Page

Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254 (N.D. Ill. 1978) 51

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998) 39

General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 36

Georgia v. Rachel, 384 U.S. 780 (1966) 38

Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982) 50

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 28, 29

Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979) 41

Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) 50

Hart v. Transit Management of Racine, Inc., 426 F.3d 863 (7th Cir. 2005) 8, 9, 10

Hill v. Goodyear Tire & Rubber, Inc., 918 F.2d 877 (10th Cir. 1990) 51

Hishon v. King & Spalding, 467 U.S. 69 (1984) 27

Hurd v. Hodge, 334 U.S. 24 (1948) 17, 18

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) 13, 35-36, 37, 38

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) ..... *passim*

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 2, 11, 17

TABLE OF AUTHORITIES – Continued

Page

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004) 46

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 19

Kolstad v. American Dental Association, 527 U.S. 526 (1999) 30

Lefkowitz v. Turley, 414 U.S. 70 (1973) 19

Little v. United Technologies, 103 F.3d 956 (11th Cir. 1997) 9

London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981) 34, 51

Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir. 2000) 30

Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989) 39, 51

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 33, 38

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990) 29, 51

Miller v. Fairchild Industries, Inc., 885 F.2d 498 (9th Cir. 1989) 50

O'Hare Truck Service, Inc. v. Northlake, 518 U.S. 712 (1996) 10-11, 19

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) ..... *passim*

Phillips v. Martin Marietta Corp., 411 F.2d 1 (11th Cir. 1969), *rev'd*, 400 U.S. 542 (1970) 32

TABLE OF AUTHORITIES – Continued

Page

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1970) 32-33

Pollard v. E. I. du Pont de Nemours & Co., 532 U.S. 843 (2001) 42, 43

Rankin v. McPherson, 483 U.S. 378 (1987) 19

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 42, 47

Runyon v. McCrary, 427 U.S. 160 (1976) ..... *passim*

Sheet Metal Workers' International Association v. Lynn, 488 U.S. 347 (1989) 10, 20-21, 24

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) ..... *passim*

Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001) 30

Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431 (1973) 36

United States v. Jackson, 390 U.S. 570 (1968) 19

STATE CASE

Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d 314 (Ill. 1987) 28

CONSTITUTIONAL AMENDMENT

U.S. CONST. amend. XIII, § 2 2

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

12 U.S.C. § 3106a 43
16 U.S.C. § 1702(b) 43
18 U.S.C. § 246 43
20 U.S.C. § 1681, *et seq.* 13, 38, 39, 43
20 U.S.C. § 1703 43
29 U.S.C. § 158 43
29 U.S.C. § 206(d) 43
29 U.S.C. § 401, *et seq.* 20, 21
29 U.S.C. § 2938 43
42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1981a 14, 42, 43
42 U.S.C. § 1982 ..... *passim*
42 U.S.C. § 2000d-3 43
42 U.S.C. § 2000e, *et seq* ..... *passim*
42 U.S.C. § 9821 43
42 U.S.C. § 9849 44
42 U.S.C. § 10504 44
42 U.S.C. § 10604 44
42 U.S.C. § 98581(a)(3) 44
43 U.S.C. § 1626(g) 47
43 U.S.C. § 1863 44
45 U.S.C. §§ 151, *et seq* 44

TABLE OF AUTHORITIES – Continued

Page

47 U.S.C. § 398 44

47 U.S.C. § 544 44

50 U.S.C. App. § 2407(a)(1)(B) 44

Civil Rights Act of 1866, 14 Stat. 27 ..... *passim*

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... *passim*

LEGISLATIVE HISTORY

110 Cong. Rec. 7207 (1964) 44

110 Cong. Rec. 13650-52 (1964) 44

118 Cong. Rec. 3173 (1972) 45

118 Cong. Rec. 3370 (1972) 46

H.R. 9247, 92d Cong., 1st Sess. (1971) 44

H.R. REP. NO. 92-238 (1971) 44

H.R. REP. NO. 102-40 ..... 47, 53, 54

OTHER

Report of C. Shurz, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess., 19 (1865) 22

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, originally enacted as § 1 of the Civil Rights Act of 1866, 14 Stat. 27, and amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, to read as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

A. Statutory Background.

Congress first enacted what later became section 1981(a) as part of § 1 of the Civil Rights Act of 1866 (the "1866 Act"), pursuant to its broad authority "to enforce [the Thirteenth Amendment] by appropriate legislation." U.S. CONST. amend. XIII, § 2. *See also* JA 124 ("The Civil Rights Act of 1866 was passed pursuant to section 2 of the Thirteenth Amendment, which provided Congress with the legislative power to enforce the Thirteenth Amendment's prohibition on slavery."). At the time the legislation was first passed, the states had recently ratified the Thirteenth Amendment, but Congress faced overwhelming evidence that the Amendment's promise to end slavery would be hollow if steps were not taken to eliminate widespread efforts to obstruct the participation of freed slaves in economic life. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-28 (1968) ("The congressional debates are replete with references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.").

In 1991, Congress enacted the Civil Rights Act of 1991 (the "1991 Act"), partly in response to the narrow construction of section 1981 announced by the Court in *Patterson v. McLean Credit Union*, 491 U.S.

164 (1989). The 1991 Act amended section 1981 by adding two sub-sections, 1981(b) and 1981(c), to clarify the scope of the original text. Congress did not alter the original text of section 1981, but simply renamed it section 1981(a). Section 1981(b) explains that the term "to make and enforce contracts" includes not only "the making, performance, modification, and termination of contracts," but also "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Section 1981(c) codifies the holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that section 1981 protects against private acts of discrimination.

B. Factual And Procedural Background.

Petitioner, Cracker Barrel Old Country Stores, Inc. ("Cracker Barrel"), operates a chain of restaurants and retail stores in Illinois and throughout parts of the United States. R. 53 at 1, ¶ 2 ("Plaintiff's Local Rule 56.1 Statement of Material Facts" or "Plaintiff's Stmt. of Facts"). In keeping with its motto of "pleasing people," *see, e.g.*, JA 93, Cracker Barrel has adopted and implemented an Open Door Policy that invites employees to take up with management any kind of suggestions, complaints or problems affecting their jobs. JA 97. The policy also makes clear that "Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race," *id.* at 95, and "[t]he company values and respects all employees." *Id.* at 96. The Open Door Policy aims to advance the "welfare, work,

working conditions, and satisfaction [of] an employee of Cracker Barrel," *see* JA 97, by creating mandatory procedures for reporting, investigating, and resolving employee complaints of race discrimination and harassment. *Id.* at 93-101.

Respondent Hedrick Humphries, an African-American, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois for three years. JA 45 at ¶ 6; JA 49 at ¶ 19. During his tenure at Cracker Barrel, Humphries was directly supervised by three different general managers: Don Sessions, Steve Cardin, and Ken Dowd. JA 118. Each of these general managers, in turn, reported to William Christensen, the district manager responsible for several Cracker Barrel stores in the area. JA 119; R. 53 at 5, ¶ 17 (Plaintiff's Stmt. of Facts). Sessions, who was Humphries supervisor for two and a half years, "testified that he considered Humphries to be his best associate manager," and Humphries received annual merit raises and bonuses. JA 118.

In July 2001, Cardin became the acting general manager in the Bradley store. *Id.* Cardin "routinely made racially derogatory remarks," not only in Humphries' presence, but also in the presence of his coworkers. JA 119. Cardin was also forthright about the fact that "he was there 'for the white people' and was 'going to take care of the white people.'" *Id.* Cardin's racial animus went beyond his insensitive comments; he promptly issued five disciplinary reports against Humphries covering alleged misconduct such as bank deposit shortages, failing to secure

the store's front door, and inappropriately crediting meals to customers who complained. *Id. See also* R. 53 at 29-32, ¶¶ 99-121 (Plaintiff's Stmt. of Facts). Humphries believed these disciplinary reports were groundless and racially motivated. JA 119. *See also* R. 53 at 29-33, ¶¶ 99-121 (Plaintiff's Stmt. of Facts). In August and October, 2001, Humphries invoked Cracker Barrel's Open Door Policy and complained to Christensen about Cardin's racially offensive remarks in the workplace and about the racially-motivated discipline to which Cardin subjected him. JA 46 at ¶ 11; JA 48 at ¶ 16. Christensen took no action. JA 46 at ¶ 11; *see also* R. 53 at 33-35, ¶¶ 130, 132-33, 136, 138, 140, 142-43, 145.

In November 2001, Joe Stinnett, one of Humphries' fellow associate managers, fired an African-American food server, Venis Green. JA 119. Humphries thought Green's termination was motivated by race because a white Cracker Barrel employee had not been terminated for engaging in the same behavior as Green, *id.*, and because Stinnett did not have the authority to fire Green under Cracker Barrel's policies. JA 48-49 at ¶ 17. Humphries complained to general manager Dowd (in Stinnett's presence) that Green's termination was racially discriminatory. R. 53 at 36, ¶ 159 (Plaintiff's Stmt. of Facts). Dowd took no action on Humphries' complaint. *Id.* at 37, ¶ 162.

Shortly after Green's termination, Christensen was at the Bradley store and invited employees to raise with him any concerns or problems they had. *Id.* at ¶ 163. Humphries used this opportunity to complain to Christensen that Green's termination was

racially-motivated; he also reminded Christensen of his earlier complaints about Cardin. *Id.* at 33, ¶ 132, 37, ¶¶ 163-64. *See also* JA 119-20. Christensen berated Humphries for "going outside the management group" in making this complaint and advised him to set up a meeting with Dowd to discuss Green's termination. JA 120. The day before that meeting was to occur, Christensen fired Humphries. *Id.* The ostensible reason for his termination was that Stinnett claimed that Humphries had left the store safe open overnight – a charge that Humphries denies. *Id.* Prior to firing Humphries, Christensen did not discuss Stinnett's accusation with him or conduct any investigation into the truth of Stinnett's story. *Id.*

On August 5, 2002, Humphries timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"). JA 36-39; JA 54-57. The EEOC conducted an investigation and issued Humphries a right-to-sue letter dated March 3, 2003. JA 34-35; JA 58-59. On June 2, 2003, Humphries timely filed a *pro se* complaint against Cracker Barrel, alleging race discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and 42 U.S.C. § 1981. JA 29-42.

At the same time he filed his *pro se* complaint, Humphries filed an application to proceed *in forma pauperis*. JA 83. *See also* R. 3 (6/2/03 Application by Plaintiff to Proceed *In Forma Pauperis* and Financial Aid Affidavit, or "IFP Application."). The district court denied the IFP Application because of questions

regarding Humphries' finances, but did not direct Humphries to pay the filing fee. R. 5 (Minute Order of 6/25/03). Humphries filed two amended IFP Applications in an effort to address the court's questions, and the district court denied them both. JA 83-84. *See also* R. 8 (10/14/03 IFP Application); R. 10 (Minute Order of 10/22/03); R. 11 (12/2/03 IFP Application); and R. 13 (Minute Order of 12/8/03). It was not until the denial of the final IFP Application, that the court ordered Humphries to pay the filing fee, which he did on January 12, 2004. JA 84; R. 13 (Minute Order of 12/8/03); R. 17 (1/12/04 Receipt of Payment of Filing Fee). Humphries then retained counsel and filed a First Amended Complaint on July 27, 2004. JA 43-53; R. 27 (First Amended Complaint).

Cracker Barrel moved to dismiss Humphries' Title VII claims arguing that because Humphries did not pay his filing fee within ninety days after receiving his right-to-sue letter, they were not timely filed. JA 84. The district court agreed, based upon a local rule the court had never cited to the *pro se* Humphries that required him to pay his statutory filing fee within, at most, fifteen days after the court denied his first IFP Application. JA 86-87; *see also* R. 5 (Minute Order of 6/25/03); R. 10 (Minute Order of 10/22/03); and R. 13 (Minute Order of 12/8/03).

Humphries proceeded on his section 1981 claims. Cracker Barrel moved for summary judgment on those claims in June 2005, contending that Humphries lacked sufficient evidence. JA 113-14. The district court granted summary judgment solely on those grounds. JA 114-16. In seeking summary judgment,

Cracker Barrel never argued that Humphries' retaliation claim was not cognizable under section 1981. JA 121. *See also* R. 47 (6/7/05 Memorandum of Law in Support of Defendant's Motion for Summary Judgment); and R. 56 (7/14/05 Reply By Defendant In Support of Its Motion for Summary Judgment).

On appeal, Cracker Barrel argued for the first time that section 1981 does not protect against retaliation. JA 121; *see also* 1/18/06 Appellee's Reply Brief at 13-15.[1] In making its argument, Cracker Barrel relied solely on the Seventh Circuit's opinion in *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005). *See* 1/18/06 Appellee's Reply Brief at 13-15. In *Hart*, the court dismissed a section 1981 retaliation claim brought by a white employee who had opposed racial discrimination against black employees and in so holding stated, without analysis,

---

[1] Because Cracker Barrel had not previously challenged the viability of his claims under section 1981, when Humphries appealed the dismissal of those claims, he did not appeal the dismissal of his Title VII claims. The Seventh Circuit acknowledged that Cracker Barrel forfeited its argument about the viability of Humphries' section 1981 retaliation claim, but nevertheless chose to resolve the question "in the interests of justice," in part because of concerns that the lower courts were misapplying its holding in *Hart*, and because at the time it believed that Humphries would not be harmed if the court resolved Cracker Barrel's forfeited argument. JA 122. Petitioner's failure to raise this issue below makes this case an inappropriate vehicle for consideration of the question presented. Therefore, if the Court were to reverse, Humphries would revisit petitioner's waiver on remand.

that section 1981 "does not include a prohibition against retaliation for opposing racial discrimination." 426 F.3d at 866. Humphries distinguished *Hart*, which had rested its holding on a decision of the Eleventh Circuit, *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997):

> *Little* concludes only that a *prima facie* case was not presented by the white plaintiff [in that case] because the plaintiff did not allege discrimination "due to his race. . . ." [103 F.3d] at 961. . . . Because *Hart* relies solely on *Little* without further analysis, *Hart* must be limited in the same way. Therefore, at most, *Hart* can only mean that a retaliation claim under § 1981 must be based on the plaintiff's race; that is, the plaintiff must contend that his employer discriminated or retaliated against him because of his race.

2/1/06 Appellant's Reply Brief at 5-6. *Little* was limited to its facts in a later Eleventh Circuit opinion, *Andrews v. Lakeshore Rehabilitation Hospital*, 140 F.3d 1405 (11th Cir. 1998), which held that section 1981 protected against race-based retaliation. *Id.* at 1411-13. Humphries explained that, like the plaintiff in *Andrews*, his retaliation claim was race-based and, thus, "actionable under Section 1981. Even if this Court reaches the merits of the viability of retaliation claims under § 1981, Cracker Barrel is simply wrong that § 1981 does not provide a remedy for race-based retaliation." 2/1/06 Appellant's Reply Brief at 2.

The Seventh Circuit agreed that *Hart* had "no application to the facts here, where the plaintiff is plainly asserting retaliation stemming from discriminatory acts targeting him." JA 137. The court then concluded that section 1981 provides broad protection against retaliation and, in so doing, overruled *Hart*. JA 148-49. The court also agreed that Humphries had presented sufficient evidence to support h retaliation claim, and remanded the case for trial. JA 157-58.

SUMMARY OF ARGUMENT

Section 1981 affirmatively guarantees a series of rights, among them the right to "make and enforce contracts." By its terms, section 1981 is different, and broader, than statutes that simply prohibit discrimination. The operative language of section 1981 describes the rights it protects. It does not enumerate conduct that violates those rights as does, for example, Title VII.

The existence of a right provides the right-holder protection not only from direct obstruction of the right, but also from reprisals for exercising the right. The principle that rights are protected from reprisal applies to statutory rights, *see Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 355 (1989) (implied statutory protection against retaliation), as well as constitutional rights, *see, e.g., O'Hare Truck Serv.*,

Inc. v. Northlake, 518 U.S. 712, 715 (1996) (First Amendment protection against retaliation).

In the case of section 1981, the Court has already recognized that plaintiffs are protected from direct obstruction of rights protected by the statute. *See, e.g., Runyon*, 427 U.S. at 172. Historically, the need for protection from reprisals was critical when section 1981 was first enacted. The Civil Rights Act of 1866 was adopted to enforce the Thirteenth Amendment at a time when there was widespread retaliation against freed slaves who attempted to assert their new rights. *See Jones*, 392 U.S. at 427-28; *see also, e.g., Bailey v. Alabama*, 219 U.S. 219, 244 (1911) (recognizing the need for protection against retaliation for the exercise of Thirteenth Amendment rights). Section 1981's protections against reprisal for exercising statutory rights are firmly rooted.

When Humphries complained to his district manager about race discrimination, both against himself and a co-worker, he was exercising his section 1981 right to enjoy the "benefits" or "privileges . . . of the contractual relationship" as well as his right to enforce his contract. Cracker Barrel encouraged employees to complain and created an internal grievance procedure designed to help them do so – the "Open Door Policy." That policy not only created an opportunity for employees to make complaints, it served as a mandatory reporting and investigation structure specifically to resolve complaints of discrimination and harassment. Cracker Barrel could not, under section 1981, expressly make this benefit

available only to white employees; nor could Cracker Barrel retaliate against Humphries because he was a black worker who exercised his right to enjoy that benefit. Similarly, Cracker Barrel could not fire Humphries because he was a black worker who used the Open Door Policy's complaint and investigation procedures to enforce petitioner's anti-discrimination policy.

Even if Humphries' complaints about race discrimination do not constitute an exercise of a section 1981 right, his cause of action for retaliation for making those complaints is still cognizable under section 1981 because Cracker Barrel's conduct constitutes forbidden race-based retaliation. Section 1981 prohibits treating a subset of black workers differently than comparable white workers. If an employer offers the benefit of continued employment to white workers who complain about race discrimination, it must offer the same benefit to black workers who make the same complaint. It cannot fire black complainers, but not white complainers.

Humphries' claim is cognizable under section 1981 both because Cracker Barrel retaliated against him for exercising his section 1981 rights and because it engaged in race-based retaliation. Consideration of these issues resolves this case. However, section 1981 also forbids retaliation against a person who has opposed acts of racial discrimination that violate the statute. This principle was established in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which recognized that section 1981's companion statute –

section 1982 – provides such broad protection. This Court recently relied on *Sullivan* in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), in which it concluded that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.* ("Title IX"), like section 1982, protects against retaliation for complaining about discrimination. *Id.* at 178. And section 1981 provides a more compelling case for recognizing retaliation than does Title IX. Section 1981, unlike Title IX, has no mechanism for enforcement other than private action. Without the ability to report discrimination free of retaliation, section 1981 cannot provide the "adequate protection to victims of discrimination" that Congress explicitly sought. *See* Civil Rights Act of 1991, 105 Stat. at 1071, at Sec. 3(4).

Despite the text, history, and precedent that establish section 1981's protection against retaliation, petitioner argues that section 1981 should be narrowly construed to preclude a cause of action for retaliation because a different statute – Title VII – already provides such relief. This argument ignores the fact that Congress expressly created overlapping remedies in the two statutes. It has long been understood that Title VII "was designed to supplement rather than supplant" other employment discrimination laws, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974), including section 1981. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460-61 (1975). Any doubt about this was laid to rest

when Congress enacted the Civil Rights Act of 1991, in which it acknowledged the overlap between section 1981 and Title VII, and, rather than eliminating the overlap, codified it. *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (creating right for successful Title VII plaintiffs to recover punitive and compensatory damages subject to cap that expressly does not apply to plaintiffs who can also recover under section 1981). Moreover, there is no indication in the text of either statute to suggest a principled rule for when Title VII would trump section 1981 and when it would not. Furthermore, because section 1981 applies to non-employment contracts and to numerous employees whose employers are exempt from Title VII's coverage, the overlap between the two statutes is far from complete.

Finally, petitioner's argument that the decision in *Patterson* compelled Congress to include an express anti-retaliation provision in its 1991 amendment of section 1981, necessarily assumes that no such protection existed before *Patterson*. But the principles discussed above that establish section 1981's protection against retaliation date back to the statute's enactment in 1866. The effect of *Patterson* was only to limit protection to claims of retaliation for exercising section 1981 rights related to contract formation or contract enforcement. When Congress amended the statute in 1991, it expanded the scope of the rights protected by section 1981 beyond the more limited rights recognized by *Patterson*, thereby

clarifying that section 1981 protects against retaliation throughout the contractual relationship.

ARGUMENT

I. RETALIATION FOR THE EXERCISE OF SECTION 1981 RIGHTS VIOLATES THE STATUTE.

A. Section 1981 Forbids Reprisals Against Individuals For Exercising The Substantive Rights The Statute Protects.

The terms of section 1981 are significantly different, and broader, than a simple prohibition against discrimination. Unlike, for example, section 703(a) of Title VII, section 1981 is not framed merely "to prevent injury to individuals based on who they are, *i.e.*, their status." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006). Instead, most of section 1981 is concerned with protecting individuals "based on what they do, *i.e.*, their conduct." *Id.*

Section 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

> punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rather than taking the form of a prohibition barring specified actors (*e.g.*, employers) from engaging in particular forbidden conduct (*e.g.*, discrimination in employment), section 1981(a) affirmatively guarantees a series of enumerated "right[s]." Five of those are rights to engage in particular conduct: the rights to "make . . . contracts," to "enforce contracts," "to sue," to "be parties," and to "give evidence."[2]

This rights-creating language stands in contrast to the last clause of section 1981(a), which is a prohibition against a particular practice, the imposition of unequal "punishment[s], pains, penalties, taxes, licenses and exactions," as well as to Title VII, which defines a series of "unlawful employment practices" in which employers may not engage. *See* 42 U.S.C. §§ 2000e-2, 2000e-3. The difference in statutory language is of controlling importance. Prohibited violations of the rights-creating provisions of section 1981 are not found in any enumerated list; in this regard section 1981 necessarily forbids *any* conduct – not merely certain specified actions – that impairs those rights. *See* 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment . . . "); *see also Patterson*, 491 U.S. at 175-76

---

[2] Section 1981(c), enacted as part of the 1991 Act, recognizes this language creates "rights." 42 U.S.C. § 1981(c) ("[t]he rights protected by this section.").

("We must decide also whether the conduct of which petitioner complains falls within one of the enumerated rights protected by § 1981."). Section 1981 must be understood in terms of protecting the rights it creates, not in terms of defining the scope of prohibited conduct.

A defendant's conduct would impair the rights enumerated in section 1981, or the similarly phrased section 1982,[3] if it actually prevented a plaintiff from exercising the right in question. Thus in *Runyon*, the Court held that defendant school officials had violated section 1981 because they had directly obstructed plaintiffs' rights to make contracts when they refused to admit plaintiffs' black children as students. 427 U.S. at 172. *See also Jones*, 392 U.S. at 412 (defendant refused to sell plaintiff a home because he was black, thereby directly obstructing plaintiff's section 1982 right to purchase property). In *Hurd v. Hodge*, 334 U.S. 24 (1948), a third party – a court – prevented the black plaintiffs from buying land from a white seller.

---

[3] Section 1982 provides:

> All citizens of the United States shall have the same *right*, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (emphasis added). Significantly, as is true of much of section 1981, the rights guaranteed by section 1982 are to engage in specified types of conduct.

> The Negro petitioners entered into contracts of sale with willing sellers for the purchase of properties upon which they desired to establish homes. Solely because of their race and color they are confronted with orders of court divesting their titles in the properties and ordering that the premises be vacated. . . . Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold, and convey real property is to reject the plain meaning of language.

Id. at 34.

In addition, where the law creates a right – be it statutory or constitutional – the right holder is protected not only from conduct that prevents the exercise of the right, but also from actions that impose sanctions because he or she exercised that right. For example, in *Hurd*, the section 1982 right to purchase real property on a non-discriminatory basis would have been violated if the court, rather than divesting James and Mary Hurd of their title to the land, had instead sentenced them to prison for violating a city ordinance forbidding non-whites from owning the real property in question. Similarly, in *Runyon v. McCrary*, the section 1981 right at issue would have been impaired if Mr. Runyon had admitted young Michael McCrary to the Bobbe's School, but then in retaliation arranged for Mr. and Mrs. McCrary to be fired from their jobs.

The existence of a right routinely affords the right-holder two distinct and equally essential protections: protection from direct obstruction of that right, and protection from reprisal for exercising the right. The First Amendment, for example, precludes (save in the most extraordinary of circumstances) the imposition of a prior restraint that actually prevents an individual from engaging in speech. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). But the First Amendment also applies if the government punishes those who have exercised their right to engage in protected speech. This Court's First Amendment jurisprudence recognizes the unconstitutionality of various forms of retaliation taken against individuals who exercised First Amendment rights. *See, e.g., O'Hare Truck Serv., Inc. v. Northlake*, 518 U.S. 712, 715 (1996) (First Amendment protections extend to case "where government *retaliates* against a contractor . . . for the exercise of rights of political association.") (emphasis added); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."). Other constitutional rights are similarly protected from reprisals.[4]

---

[4] *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70, 82, 84 (1973) (finding New York law that cancelled contracts with state if contractor refused to testify about those contracts a "significant infringement" of Fifth Amendment right against self-incrimination); *United States v. Jackson*, 390 U.S. 570, 581-82 (1968) (provision in Federal Kidnapping Act that imposed death

(Continued on following page)

These principles are not limited to constitutional rights or governmental interference with rights. *Sheet Metal Workers' International Ass'n v. Lynn*, 488 U.S. 347 (1989), concluded that the establishment of federal rights under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.*, carries with it protection from reprisals as well as protection from obstruction. That case concerned the scope of the protections created by section 101(a)(2), which (in rights-creating language similar to section 1981(a)) provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views . . . upon any business properly before the meeting. . . .

29 U.S.C. § 411(a)(2). The plaintiff spoke at a union meeting in opposition to a proposal to increase member dues. Five days later, the union removed him from his position as a business representative. 488 U.S. at 350. The union argued that it had not infringed Lynn's section 101 rights because "Lynn, like other members of the Local, was not prevented from attending the special meeting, expressing his views

---

penalty only when recommended by a jury unnecessarily chilled the exercise of Fifth Amendment right to plead not guilty and Sixth Amendment right to demand a jury trial by "penalizing those who choose to exercise them").

on [the] dues proposal, or casting his vote." *Id.* at 353-54.

This Court rejected that argument, concluding that the plaintiff's "retaliatory removal stated a cause of action." *Id.* at 355. The section 101 rights of union business agents are

> interfered with, albeit indirectly, [when] the agents [are] forced to choose between their rights and their jobs. . . . This [is] so even though the business agents [are] not actually prevented from exercising their [section 101] rights.

Id. at 354. The Court further explained that "Lynn paid a price for the exercise of his membership rights," because the union's action "presumably discouraged him from speaking out in the future." *Id.* Finally, the Court concluded that the union's dismissal of Lynn was a particularly serious violation of section 101 because it was likely to deter other union members from exercising their own rights. "Seeing Lynn removed from his post just five days after he led the fight to defeat [a] dues increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril." *Id.* at 355.

The need for protection from reprisals for the exercise of protected rights was of manifest importance when the Civil Rights Act of 1866 was adopted to enforce the Thirteenth Amendment. In the wake of Emancipation, there were few reported instances in

which former slave owners actually used physical force to restrain their former slaves from leaving their plantations. What was far more widespread and effective in preserving slavery in the aftermath of the Civil War were reprisals by the "night riders" and other private "regulators," who attacked ex-slaves for exercising their newly won right to leave their former owners.

> Organized patrols, with negro hounds, keep guard over the thoroughfares; bands of lawless robbers traverse the country, and the unfortunate who attempts to escape, or he who returns for his wife or child, is waylaid or pursued with hounds, and shot or hung.

Report of C. Shurz, S. EXEC. Doc. NO. 2, 39th Cong., 1st Sess., 19 (1865).

In *Bailey v. Alabama*, 219 U.S. 219 (1911), the Court recognized the importance of protection against retaliation for the exercise of Thirteenth Amendment rights. *Bailey* construed the Thirteenth Amendment to prohibit reprisals against workers who sought to exercise their rights under that constitutional guarantee. The state law in that case had, in effect, made it a crime for a worker to leave his employer during the course of an employment contract in any case in which the worker had received an advance payment. Enforced labor for the payment of a debt, the Court noted, was peonage. 219 U.S. at 243. Just as the Thirteenth Amendment forbade a state from physically preventing a debtor-worker from leaving his or her employment, so too did the Amendment bar a

state from retaliating against a worker because he or she had done so.

> [T]he state could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the state could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. In contemplation of the law, the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station.

Id. at 244 (internal quotation marks and citation omitted).

These well-established principles apply to the rights created by section 1981, which are similarly protected from reprisals as well as from obstruction. Section 1981 would be violated if an employer directly prevented a worker from exercising one of the enumerated rights. The statute thus bars an employer from carrying out a policy of forbidding black but not white workers from "giv[ing] evidence." 42 U.S.C. § 1981(a) ("shall have the same right . . . to . . . give evidence.") Section 1981 would be violated if, in order to prevent blacks from testifying, an employer refused to give the black (but not white) employees the time off from work necessary to testify, or hired thugs to physically bar black workers from entering the courthouse. Section 1981 would equally be violated if that employer, after its workers had succeeded in

giving evidence, singled out and dismissed the black workers who had done so. *Cf. Lynn*, 488 U.S. at 354.

B. The Conduct For Which Humphries Was Fired Constituted An Exercise Of His Section 1981 Rights.

Humphries' complaints to Christensen about race discrimination can be characterized as either an exercise of his section 1981 right to enjoy the "benefits" or "privileges . . . of the contractual relationship," or his right to enforce his contract. In either event, when Cracker Barrel terminated him for complaining about race discrimination, it interfered with his section 1981 rights.

Cracker Barrel encouraged its employees to bring complaints to management's attention. One of the express (and much publicized) benefits Cracker Barrel provided to its employees was the right to use its "Open Door Policy" for internal grievances. *See* JA 93-107. The Open Door Policy accorded employees the opportunity to take up with management officials any grievance they might have about the way in which they were being treated. JA 97. *See also* JA 100 ("We encourage you to go to your manager with any questions or suggestions, or to review *any problems or decisions affecting your job.*") (emphasis added). The Open Door Policy was intended to advance the "welfare, work, working conditions, and satisfaction [of]

an employee of Cracker Barrel." JA 97.[5] Workers were assured that they would not "get into trouble or be retaliated against by using this policy in good faith." JA 97. *See also* JA 100.

The Open Door Policy was specifically intended to be used by employees to complain about discrimination or harassment. JA 95 ("Employees who believe they have been subjected to unlawful discrimination, harassment, or retaliation *must* immediately advise their Manager, Supervisor or the Employee Relations department.") (emphasis added). *See also* JA 96-97, 99-100. The policy also created a mandatory procedure for investigating complaints of discrimination once they were made. Supervisors were directed to use detailed forms to memorialize their investigations. *See* JA 93. They were obligated to take a written, signed statement

---

[5] Internal mechanisms for redressing worker grievances are a benefit of great practical importance. If a worker's complaint does not involve violation of some statute or contract provision, the worker has no other method of obtaining redress. Even if an aggrieved employee may technically have the right to file a lawsuit, the cost and delay involved often pose an insurmountable barrier. Aggrieved workers "want jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982). The creation of an internal grievance procedure is a concession widely sought by unions in collective bargaining agreements because they provide a fast and efficient method of fairly resolving employment problems. In *Burlington Northern*, 126 S. Ct. at 2409, for example, the plaintiff used just such a grievance process to get her job back, far more quickly than would have been possible through litigation.

from the complainant, and to complete an "Incident Information" form and an "Incident Resolution" form. *Id.* Supervisors were also required to complete an Investigation Log. JA 105-107. Finally, supervisors were obligated to notify the complainant formally of the outcome of the investigation. *See* JA 95.

Humphries took advantage of the Open Door Policy on at least three occasions: in August and October 2001, when he complained to District Manager William Christensen about the fact that Acting General Manager Steve Cardin had issued racially motivated disciplinary warnings to Humphries and had made numerous racist remarks in the workplace, *see* JA 46 at ¶ 11, JA 48 at ¶ 16; and in November 2001, when Humphries reminded Christensen of his earlier complaints about Cardin and also complained that the termination of a co-worker, Venis Green, was racially discriminatory. *See* JA 49 at ¶ 18; JA 119-20. This last meeting occurred when Christensen came to the Bradley store for the express purpose of meeting "individually with employees who wished to speak with him." R. 53 at 37, ¶¶ 163-64 (Plaintiff's Stmt. of Facts). The First Amended Complaint alleges that Cracker Barrel retaliated against Humphries for making these complaints. *See* JA 49 at ¶ 20, JA 51 at ¶ 27.

By invoking the Open Door Policy, Humphries was enjoying a benefit or privilege of his contractual

relationship with Cracker Barrel.[6] Had Cracker Barrel told Humphries that the Open Door Policy was only available to white employees, it undoubtedly would have violated Humphries' section 1981 right to enjoy the same "benefits" and "privileges" of the contractual relationship. If, as is alleged here, Cracker Barrel retaliated against Humphries because he was a black worker who exercised his right to enjoy that benefit, that reprisal also violates section 1981.

Humphries was also trying to enforce his contract when he used the Open Door Policy. Cracker Barrel had a clear policy statement prohibiting racial discrimination: "Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race." JA 95, 98-99.[7] Under

---

[6] This is not to suggest that an employer must have a formal written complaint procedure like the Open Door Policy in order for making a complaint about discrimination to constitute enjoying a benefit or privilege of the contractual relationship. A benefit can be anything that "comprise[s] the 'incidents of employment,' or that form[s] an 'aspect of the relationship between the employer and employees.'" *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (citations omitted). If, for example, an employer invited employees in some less formal way to make complaints (such as an employee hot line or a suggestion box), all employees who took advantage of the opportunity to complain would be enjoying a benefit of the contractual relationship. Any interference with the enjoyment of that benefit on the basis of race would violate section 1981.

[7] Cracker Barrel had an equally clear policy regarding harassment: "Cracker Barrel . . . does not tolerate harassment in any form. . . . Employees must avoid any action or conduct which

(Continued on following page)

Illinois law, a reasonably clear policy statement that is disseminated to employees so they are aware of its contents and continue to work after they receive it can create an "enforceable contractual right[]." *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987).[8]

Cracker Barrel's Open Door Policy, with its highly structured internal complaint and investigation procedures, functioned as a means for employees to enforce petitioner's anti-discrimination policy. Humphries' efforts to obtain redress through the Open Door Policy constituted contract enforcement within the scope of section 1981. In *Patterson*, the Court held that section 1981's enforcement clause applies not only to "the legal process," but also to "nonjudicial methods of adjudicating disputes about the force of binding obligations." 491 U.S. at 177. In *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), the Court read the contract-enforcement clause of section 1981 broadly. There the Court affirmed a

---

could be viewed as harassment, including but not limited to . . . [v]erbal abuse of a . . . racial nature . . . racially offensive jokes." JA 96. *See also* R. 54 at Ex. O (Plaintiff's Appendix in Support of Stmt. of Facts).

[8] Whether all the elements necessary to establish the anti-discrimination policy as a contract right would be met here has not been developed in this case because Cracker Barrel did not question the viability of a section 1981 retaliation claim in its summary judgment motion. Because these anti-discrimination policies arguably created contractual rights that Humphries had a section 1981 right to enforce, he ought to have the opportunity to prove this was the case.

finding that a union had violated section 1981 when it refused to file grievances on behalf of black members asserting that the employer had engaged in racial discrimination, which was forbidden by the applicable collective bargaining agreement. *Id.* at 665-66. Such grievances, though at times a highly effective way of enforcing those labor-management contracts, do not involve binding adjudication. *Goodman* nonetheless concluded that such methods of implementing contractual rights were protected by section 1981. *Id.* at 669. *See also Patterson*, 491 U.S. at 177 (citing the process in *Goodman* as an example of section 1981 contract enforcement). When Cracker Barrel fired Humphries for trying to enforce the anti-discrimination provision of his contract, it violated section 1981. *See, e.g., McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 112 (7th Cir. 1990) (recognizing that where contract contains express anti-discrimination term, section 1981 would proscribe racially motivated interference with efforts to enforce that term).

Equally important, section 1981 should protect Humphries from retaliation for using Cracker Barrel's Open Door Policy because the policy *required* that he report Cardin's racially harassing comments and racially discriminatory disciplinary warnings. *See* JA 95. Many employers have instituted such mandatory reporting procedures to reduce their liability for sexual and racial harassment and exposure to punitive damages for discrimination. In the Title VII context, this Court has created incentives

for employers "to adopt antidiscrimination policies" that include processes for making internal complaints of harassment and discrimination for the express purpose of encouraging employees to report such conduct, with the expectation that the conduct could then be remedied without resort to litigation. *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999) (creating affirmative defense for employer against vicarious liability for punitive damages when conduct of its agents is contrary to employer's "good faith efforts to comply with Title VII"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (creating affirmative defense for employer against vicarious liability for some instances of supervisor sexual harassment where "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and where plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (same).

These affirmative defenses have been applied to claims of racial harassment under section 1981, *see Swinton v. Potomac Corp.*, 270 F.3d 794, 803 n.3 (9th Cir. 2001), and to limit punitive damage awards under section 1981. *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 445 (4th Cir. 2000) (applying good faith defense to punitive damage award under section 1981). If employers who were not otherwise subject to Title VII were given free rein to fire employees who use such internal company procedures to complain

about racial harassment or discrimination, it would create a perverse incentive for employers to create a mandatory reporting structure. Instead of using the procedures to combat racial harassment and discrimination as the Court intended, employers could use them to insulate themselves both from liability and from an obligation to address discrimination and harassment in the workplace, by weeding out the troublemakers who complain about it.[9] Affording employers this "heads I win, tails you lose" advantage is contrary to the goal of creating such policies to avoid the harms discrimination and harassment cause in the workplace. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 806.

II. SECTION 1981 FORBIDS RACE-BASED RETALIATION.

Section 1981 forbids an employer from denying a black worker the same "benefits . . . of the contractual

---

[9] Protection from retaliation claims under section 1981 would also give employers an unfair advantage in circumstances where an employee suffers harassment from a co-worker (as opposed to a supervisor). In those situations, the employer's negligence in failing to stop the harassment provides the basis for liability and the employer is liable only "if it knew or should have known about the conduct." *Ellerth*, 524 U.S. at 759. If an employer can legally fire an employee who complains about racial harassment by a co-worker, employees will be reluctant to make an internal complaint about racial harassment. Yet, if an employee does not make an internal complaint about racial harassment, his negligence claim against the employer will fail as a matter of law.

relationship" that are accorded to white workers. That prohibition is of course violated if an employer discriminates against all black workers on the basis of race. But section 1981 is violated as well if, on the basis of race, the employer treats a particular subset of black workers differently than comparable white employees. Even if Cracker Barrel could lawfully dismiss all workers who assert they are victims of racial discrimination, section 1981 requires that it treat black and white complainants alike. *Cf.* JA 166 (Easterbrook, C.J., dissenting). If an employer accords the benefit of continued employment to white workers who allege they were the victims of discrimination, it must accord "the same right" to black workers who make the same allegation. This is true regardless of whether the black workers were actually exercising a section 1981 right when they made their complaints.

In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970), the plaintiff in a Title VII action alleged that she had been denied employment because Martin Marietta had a policy of refusing to hire women (but not men) with pre-school-age children. 400 U.S. at 543. Phillips' claim was not founded on Title VII's anti-retaliation provision, but on the section 703(a) prohibition against discrimination on the basis of sex. The court of appeals dismissed her claim, reasoning that the Title VII bar to discrimination on the basis of sex applies only to a practice of discriminating against all women. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3-4 (11th Cir. 1969). This Court reversed.

Section 703(a), the Court held, forbids an employer from having "one hiring policy for women and another for men – each having pre-school-age children." 400 U.S. at 543. Section 1981 would similarly prohibit an employer from dismissing black employees with pre-school-age children but not white employees who also have them. Likewise, section 1981 forbids an employer from having one dismissal policy for blacks who complain about race discrimination, and another for whites who complain about such discrimination.

In the context of section 1981, this Court has recognized that an employer may not, on the basis of race, deny employees who engage in the same conduct – even culpable conduct – the benefits of the contractual relationship. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the white plaintiffs were fired because they misappropriated cargo being shipped by the employer for one of its customers. The plaintiffs alleged that a black employee charged with the same offense had not been fired. This Court held that such discriminatory treatment violated section 1981. 427 U.S. at 285-96. Section 1981 protected McDonald from being fired on a discriminatory basis even though he was a thief; it would also protect him if his employer had fired him for complaining about racial discrimination, but had taken no such action against a black worker who voiced the same complaint.

Race-based retaliation is unlawful because it is a species of racial discrimination.[10] This unremarkable application of the anti-discrimination principle is sufficient to resolve this case. In the court below, Humphries unequivocally asserted that Cracker Barrel had engaged in "*race-based* retaliation," 2/1/06 Appellant's Reply Brief at 2, and that he could proceed with his claim under section 1981 because Cracker Barrel had "retaliated against him because of his race." *Id.* at 5-6.

Cracker Barrel has asked this Court to decide whether retaliation is cognizable under section 1981. The answer, as Sections I and II demonstrate, is yes, at least some of the time, and certainly under the circumstances that Humphries has alleged. In fact, section 1981 provides even broader protection against retaliation under this Court's established precedent.

---

[10] Lower courts have noted that a claim of race-based retaliation is distinct from a simple claim of retaliation. In *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981), the court of appeals declined to decide whether retaliation as such is actionable under section 1981, holding only that "where, as here a plaintiff charges an employer with racial discrimination in taking retaliatory action, a cause of action under § 1981 has been stated." *See also Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998) ("race-based retaliation").

III. SECTION 1981 FORBIDS DISCRIMINATION AGAINST AN EMPLOYEE FOR OPPOSING RACIAL DISCRIMINATION PROHIBITED BY THE STATUTE.

Humphries contends that Cracker Barrel retaliated against him because he opposed acts of racial discrimination – that were themselves forbidden by section 1981 – directed against both himself and another black employee. The viability of such a section 1981 claim is firmly established by this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which provides broad protection against retaliation and is controlling here.

In *Sullivan*, a white homeowner rented a house to a black man and sought to assign him a membership interest in a private community park. 396 U.S. at 234-35. The corporation that owned the park refused to approve the assignment, and when the white homeowner protested, the corporation expelled him. *Id.* The white homeowner brought a claim against the corporation under section 1982. This Court held that the white homeowner could sue under section 1982 because he had been "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* at 237. If the corporation's sanction was not actionable, the Court reasoned, it "would give impetus to the perpetuation of racial restrictions on property." *Id.* "*Sullivan* . . . interpreted [section 1982's] prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson v.*

Birmingham Bd. of Ed., 544 U.S. 167, 176 (2005). "*Sullivan* [held] that the white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" *Id.*

Section 1981 should be accorded the same construction as section 1982. Sections 1981 and 1982 were both carved from section 1 of the 1866 Act, and share the same general purpose and historical origins. *See, e.g., Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384 (1982); *Runyon*, 427 U.S. at 170; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973). This Court has often looked to section 1982 to interpret section 1981. *See, e.g., Gen. Bldg. Contractors*, 458 U.S. at 384; *Runyon*, 427 U.S. at 170; *Tillman*, 410 U.S. at 439-40. Moreover, the rights protected by section 1982, *e.g.*, purchasing, leasing, selling, and conveying real property, could easily be recharacterized as rights to "make and enforce contracts."[11] There is simply no meaningful analytical reason to conclude that section 1982 prohibits retaliation while section 1981 does not.

Petitioner suggests that *Sullivan* is no longer controlling because of *Patterson*. But the *Patterson* Court did not discuss *Sullivan* or a cause of action for retaliation under section 1981. A key part of the

---

[11] In fact, the plaintiffs in *Sullivan* brought their claims under section 1981 as well as section 1982. 396 U.S. at 235.

Patterson ruling was the Court's decision *not* to overrule *Runyon*, regardless of whether it agreed that "*Runyon* was correct as an initial matter." 491 U.S. at 175 n.1. In reaching this conclusion, the Court made clear that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here . . . the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 172-73. When Congress amended section 1981 in the 1991 Act, in part in response to this Court's decision in *Patterson*, it did not choose to limit or overturn the well established application of *Sullivan* to section 1981 cases and, based upon the Court's affirmation of *Runyon* and the importance of the role of *stare decisis* in construing statutes such as sections 1981 and 1982, would not reasonably have concluded that it needed to take any explicit action to assure *Sullivan's* sustained viability.

Here, *Sullivan* not only controls, it offers a straight-forward rule that will be easy for courts to administer and for employers and employees alike to understand. In *Jackson v. Birmingham Board of Education*, the Court drew heavily on *Sullivan* when it concluded that Title IX, like section 1982, protects against retaliation for complaining about discrimination prohibited under that statute.[12] 544 U.S. at 178.

---

[12] Section 1981, like Title IX, forbids discrimination. *See* section 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental *discrimination*.") (Emphasis added). That the discrimination against which

(Continued on following page)

In recognizing implied protection against retaliation for asserting a violation of Title IX, the *Jackson* court expressly recognized that such relief was necessary to provide "effective protection" against discriminatory practices prohibited by the statute. *Id.* at 180 (*quoting Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)). "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* In the same way, recognition of a cause of action for retaliation under section 1981 is necessary to provide "adequate protection to victims of discrimination." 105 Stat. at 1071, at Sec. 3(4) (explaining that one of the purposes of the 1991 Act was to expand "the scope of the relevant civil rights statutes in order to provide adequate protection to victims of discrimination."). And as in Title IX and section 1982, section 1981's prohibition against race discrimination should be construed to forbid discrimination against an individual because he or she opposed race discrimination.

---

section 1981 protects is *racial* discrimination has never been in doubt. *See Georgia v. Rachel*, 384 U.S. 780, 790 (1966) (section 1981 protects rights "specifically defined in terms of racial equality"); *see also Runyon*, 427 U.S. at 168 (section 1981 "prohibits racial discrimination"); *McDonald*, 427 U.S. at 295 (section 1981 "was meant, by its broad terms, to proscribe discrimination . . . against, or in favor of, any race"); *Patterson*, 491 U.S. at 172 (reaffirming that section 1981 "prohibits racial discrimination").

Indeed, protection against retaliation is even more essential under section 1981.[13] If, as petitioner contends, it is legal to retaliate against an employee who opposes violations of section 1981, it would be entirely lawful to fire any worker who brought a lawsuit under section 1981, or to threaten to do so unless such a lawsuit was abandoned. Although some section 1981 plaintiffs would be protected against such retaliation by section 704(a) of Title VII, many would not. On petitioner's view, it would even be lawful for an employer not covered by Title VII to adopt a formal policy of firing any worker who brings a lawsuit under section 1981, or who complains about race discrimination. Where potential section 1981 claimants could be suppressed in this manner, employers would have the ability to prevent enforcement of the law.[14]

---

[13] Under Title IX, even in the absence of private litigation, substantial alternative enforcement methods remain, and the United States itself can bring a civil action. *See Gebser v. Lago Vista Indep. Schl. Dist.*, 524 U.S. 274, 288 (1998) (recognizing administrative agencies have express authority to enforce Title IX pursuant to agency rules "implementing [Title IX's] nondiscrimination mandate through proceedings to suspend or terminate funding or through 'other means authorized by law.' ") (quoting 20 U.S.C. § 1682). No such alternative enforcement methods exist under section 1981.

[14] This has led some to conclude that protection against retaliation is inherent in the rights section 1981 creates. *See, e.g., Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1315 (7th Cir. 1989) (Cudahy, J., concurring) ("[I]f an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those

(Continued on following page)

IV. NEITHER SECTION 1981 NOR TITLE VII SHOULD BE NARROWLY CONSTRUED FOR THE PURPOSE OF AVOIDING ANY OVERLAP BETWEEN THE TWO STATUTES.

Petitioner insists that section 1981 should be narrowly construed to exclude a cause of action for retaliation because retaliation is "already" unlawful under Title VII. Pet. Br. 23. Even though the question presented here is only whether section 1981 forbids retaliation, petitioner argues more broadly that Congress intended Title VII – not any other statute – "to govern claims of race discrimination and retaliation in the employment context." Pet. Br. 9; *see also id.* at 23 ("discrimination and retaliation"); *id.* at 25 ("discrimination and retaliation"); and *id.* at 26 ("discrimination and retaliation."). Petitioner's argument ignores this Court's recognition that Congress intended for Title VII and section 1981 (as well as other federal statutes) to provide overlapping protection against discrimination. Furthermore, petitioner's suggestion that Title VII trumps section 1981 retaliation claims is unsound because the overlap between the two statutes is incomplete.

Petitioner's argument that Congress intended that Title VII would provide the exclusive federal remedy against discrimination (and retaliation) in the workplace is inconsistent with well-established

---

rights, since this would allow the employer to take away a right to protection conferred by statute.").

and widely recognized federal civil rights policy. As early as 1974, this Court held that

> legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974) (internal citations omitted). Specifically with respect to section 1981, this Court has "emphasiz[ed] the independence of the remedial scheme established by the Reconstruction-Era Acts." *Burnett v. Grattan*, 468 U.S. 42, 49 (1984); *see also Patterson*, 491 U.S. at 181 (when a cause of action lies under both section 1981 and Title VII, a plaintiff is not constrained by Title VII's "detailed procedures," and instead "is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites."); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979) ("substantive rights conferred in the 19th Century were not withdrawn, *sub silentio*, by subsequent passage of the modern statutes."); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (recognizing that Title VII and section 1981 "although related, and although directed to most of

the same ends, are separate, distinct, and independent."). The existence of more than one federal employment discrimination statute necessarily means that the various laws will provide different remedies and/or mandate use of different procedures. "Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases." *Burnett*, 468 U.S. at 52 n.14.

In the Civil Rights Act of 1991, Congress confirmed that plaintiffs may pursue remedies under both section 1981 and Title VII when it amended both statutes, fine tuning the degree to which they differ and overlap. Section 101 of the Act added section 1981(b), which provided a broad definition of "make and enforce contracts," thus deliberately increasing the overlap between section 1981 and Title VII, and overturning *Patterson's* efforts to minimize that overlap. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994) (Section 101 "enlarged the category of conduct that is subject to 1981 liability.").

Section 102 of the Act authorized the award of compensatory and punitive damages in certain Title VII cases that were previously only available under section 1981. *See Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001). This new damages provision included a cap on a plaintiff's recovery, *see* 42 U.S.C. § 1981a(b)(3), that Congress specifically provided would not apply to section 1981 plaintiffs. *See* 42 U.S.C. §§ 1981a(a)(1) (authorizing compensatory and punitive damages for unlawful intentional discrimination subject to statutory limits "provided

that the complaining party cannot recover under . . . 42 U.S.C. 1981"), and 1981a(b)(4) ("Nothing in this section shall be construed to limit the scope of, or the relief available under . . . 42 U.S.C. 1981."). *See also Pollard*, 532 U.S. at 851 (recognizing compensatory and punitive damages awarded under Title VII "may not exceed the statutory limitations set forth in § 1981a(b)(3), while such damages awarded under § 1981 are not limited by statute"). Thus, in 1991 Congress clearly signaled that it was providing victims of intentional race discrimination in the workplace relief under both Title VII and section 1981, and that it did not wish to saddle successful section 1981 plaintiffs with Title VII's restrictions and limitations.

In fact, Congress has never viewed Title VII, or any other single statute, as the exclusive remedy for employment discrimination. Title VII overlaps not only with section 1981, but also with numerous other federal laws. Congress has enacted at least nineteen federal laws that in overlapping circumstances forbid discrimination in non-federal employment on the basis of race, national origin, sex, or religion.[15] The

---

[15] *See* 12 U.S.C. § 3106a (International Banking Act of 1978); 16 U.S.C. § 1702(b) (Youth Conservation Corps); 18 U.S.C. § 246 (deprivation of relief benefits); 20 U.S.C. § 1681, *et seq.* (Title IX); 20 U.S.C. § 1703 (Equal Educational Opportunities Act of 1974); 29 U.S.C. § 158 (National Labor Relations Act); 29 U.S.C. § 206(d) (Equal Pay Act); 29 U.S.C. § 2938 (Workforce Investment Act of 1998); 42 U.S.C. § 2000d-3 (Title VI of the Civil Rights Act of 1964); 42 U.S.C. § 9821 (community

(Continued on following page)

relief afforded by these independent, overlapping statutes that address employment discrimination is necessarily implicated by petitioner's argument.

Furthermore, Congress on two occasions expressly rejected proposals to make Title VII an exclusive remedy for employment discrimination. In 1964, "the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment discrimination." *Alexander*, 415 U.S. at 49 n.9 (quoting interpretive memorandum of Senator Clark, sponsor of Title VII, at 110 Cong. Rec. 7207 (1964), citing 110 Cong. Rec. 13650-52 (1964)). The Senate rejected a similar proposal in 1972. *Id.* (citing H.R. 9247, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 92-238 (1971)). During the debates on the 1972 proposed amendment, Congress considered (and rejected) the very arguments that petitioner makes here. For example, petitioner argues that if section 1981 were construed to prohibit retaliation, plaintiffs could use section 1981 to bring suit without exhausting Title VII's administrative

---

economic development programs); 42 U.S.C. § 9849 (Head Start programs); 42 U.S.C. § 10504 (emergency federal law enforcement assistance); 42 U.S.C. § 10604 (victim compensation and assistance); 42 U.S.C. § 98581(a)(3) (child care and development block grant); 43 U.S.C. § 1863 (Outer Continental Shelf Lands Act or Outer Continental Shelf Resource Management Act); 45 U.S.C. §§ 151, *et seq.* (Railway Labor Act); 47 U.S.C. § 398 (Public Broadcasting Service and National Public Radio); 47 U.S.C. § 544 (cable communications); 50 U.S.C. App. § 2407(a)(1)(B) (war and national defense export regulation).

remedies. Pet. Br. 26. Senator Roman Hruska advanced that precise argument to justify the unsuccessful amendment. *See* 118 Cong. Rec. 3173 (1972) (remarks of Sen. Hruska) (Unless Title VII were made the exclusive remedy, "[T]he employee could completely bypass [] the EEOC . . . and file a complaint in Federal court under the provisions of the Civil Rights Act of 1866 against both the employer and union.").[16] Similarly, petitioner objects that discrimination plaintiffs in any number of cases are resorting to section 1981 after "missing the deadline for litigation under Title VII." Pet. Br. 26 (quoting Easterbrook, C.J., dissenting).[17] But it was to preserve that very option that Senator Javits advocated retaining the remedies for employment discrimination

---

[16] Moreover, Senator Hruska would not have proposed his amendment unless it was clear that Congress intended for plaintiffs to have precisely that option. *Accord Johnson*, 421 U.S. at 462 ("[T]hese are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true.").

[17] Both petitioner and the dissent below incorrectly assert that respondent resorted to section 1981 when he missed the deadline to bring suit under Title VII. *See* Pet. Br. 26; JA 160. To the contrary, petitioner timely filed his *pro se* complaint asserting claims under *both* Title VII and section 1981 from the start. His Title VII claims were dismissed solely because he was never told that the local rules required him to pay the filing fee even while his second and third IFP Applications were pending. *See* JA 84; and R. 5; R. 10, R. 13.

under section 1981 in addition to Title VII. *See* 118 Cong. Rec. 3370 (1972) (remarks of Senator Javits) (discrimination victims would need to rely on other laws because claims under Title VII "might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964.").

Petitioner maintains that its argument about the impact of Title VII on the analysis of section 1981 is limited only to retaliation claims, but its argument is, in fact, broader.[18] Petitioner argues, for example, that Congress cannot have intended the 1991 Act to impose (or expand) a prohibition against retaliation "because Title VII *already* provides for that protection." Pet. Br. 23 (emphasis added). But Title VII also "already provides" protection against discrimination in promotions, discipline or dismissal, and against racial harassment in employment. On petitioner's logic, although Congress in 1991 amended section 1981 in response to *Patterson*, that amendment added virtually nothing to section 1981, because almost every imaginable discriminatory practice was "already" forbidden by Title VII. That simply is not the law. *See Jones v. R.R. Donnelley & Sons*, 541 U.S. 369, 383

---

[18] Recognizing the sweeping implications of its own reasoning, petitioner observes that "it could be argued that Section 1981 should not apply in the employment context due to Congress' specific enactment of Title VII." Pet. Br. 21 n.9. Yet petitioner claims to address only retaliation claims in its argument. *Id.*

(2004) ("[P]etitioner's hostile work environment, wrongful termination and failure-to-transfer claims . . . 'arose under' the amendment to § 1981 contained in the 1991 Act.").

It is unclear, even with regard to retaliation, what construction of section 1981 petitioner asserts is dictated by the existence of Title VII. Petitioner appears to ask the Court to hold that section 1981 does not forbid retaliation in any context. But there are many situations covered by section 1981 to which Title VII does not apply. Section 1981, unlike Title VII, extends to the making and enforcement of contracts outside of the employment context. *See, e.g., Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 472 (2006) (business contract); *Runyon*, 427 U.S. at 172 (1976) (private school contract); *see also Rivers*, 511 U.S. at 304 ("because it covers *all* contracts . . . a substantial part of 101's sweep does not overlap Title VII.") (citations omitted) (emphasis in original). Title VII does not even cover all employment contracts. *See* 42 U.S.C. § 2000e(b) (exempting employers with fewer than 15 workers, independent contractors, certain government entities and Indian tribes from Title VII);[19] *see also* 43 U.S.C. § 1626(g) (exempting Alaska Native Corporations). *See also Johnson*, 421 U.S. at 460 ("[Title VII] is made inapplicable to certain employers."). Petitioner's argument would,

---

[19] Congress noted in 1991 that there were 3.7 million firms with fewer than 15 employees. *See* H.R. REP. NO. 102-40, pt. 1, at 90 (1991).

thus, leave many section 1981 plaintiffs without a remedy.

If petitioner is suggesting, on the other hand, that section 1981 retaliation claims are precluded only when Title VII itself applies, then the coverage of section 1981 would vary by plaintiff. A plaintiff whose employer is subject to Title VII would never have a claim for retaliation. On the other hand, a plaintiff whose employer was not subject to Title VII, or a plaintiff who brought non-employment contract claims would be permitted to assert a claim for retaliation under section 1981. This unworkable construction is not only unsupported by the plain language of either statute, it ignores what this Court has already acknowledged: when Title VII and section 1981 do overlap, courts must construe them independently, and are "not at liberty 'to infer any positive preference for one over the other.'" *Patterson*, 491 U.S. at 181 (quoting *Johnson*, 421 U.S. at 461).

V. THE CIVIL RIGHTS ACT OF 1991 RESTORED SECTION 1981's BROAD PROTECTION AGAINST RETALIATION.

Petitioner argues that Congress intended to exclude a cause of action for retaliation from section 1981 because it did not include an express anti-retaliation provision when it amended the statute in 1991. Pet. Br. 14-21. According to petitioner, this Court's opinion in *Patterson* should have signaled to Congress the need for such specificity. *Id.* To the

contrary, Congress' amendment of section 1981 expanded the statute's coverage to restore the anti-retaliation coverage that Congress and the lower courts understood existed before *Patterson*.[20]

Prior to this Court's decision in *Patterson*, the lower courts were in agreement that section 1981 provided protection against retaliation. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1410 (11th Cir. 1998) (collecting cases). The applicability of those protections, however, was closely tied to the scope of section 1981's protection against racial discrimination. In *Patterson*, the Court held that racial harassment did not "fall[] within one of the enumerated rights protected by § 1981." 491 U.S. at 176. The Court, thus, read section 1981 more narrowly than the lower courts had and concluded that the statute did not apply to conduct that occurs after the formation of a contract. *Id.* at 179. After *Patterson*, section 1981 did not protect against most racial discrimination against existing employees. While *Patterson* did not address section 1981's protection against retaliation, in its wake that protection was generally no longer applicable. The 1991 Act, by restoring the pre-*Patterson* scope of section 1981's protection against

---

[20] *Cf. Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) ("It seems unreasonable to believe that in enacting the Civil Rights Act of 1991, Congress intended to make the scope of the new § 1981(b) narrower than that of the old § 1981 as it had been interpreted by this Court and many other federal courts before *Patterson*.").

race discrimination, extended the statute's protection against retaliation to a wider range of cases.

Prior to *Patterson*, many lower courts reasoned that "[s]ection 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute." *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982).[21] In general, however, these cases involved opposition to discriminatory practices that had occurred *after* the plaintiffs were hired. *See, e.g., Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 502-503 (9th Cir. 1989) (wages, office location); *Greenwood v. Ross*, 778 F.2d 448, 450 (8th Cir. 1985) (promotion); *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 415 (8th Cir. 1984) (racial harassment); *Choudhury*, 735 F.2d at 40 (compensation); *Goff*, 678 F.2d at 594 (compensation and promotion). In the wake of *Patterson*, a worker who complained about discrimination in post-formation conduct was no longer opposing a practice that violated section 1981; therefore, the lower courts concluded that most complaints about racial discrimination were no longer protected by section 1981 against retaliation because the discrimination

---

[21] *See also Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 43 (2d Cir. 1984) ("We are unwilling to 'give impetus to the perpetuation' of racial discrimination by permitting an employer, with impunity, to penalize its employee for asserting rights under § 1981.") (internal citation to *Sullivan v. Little Hunting Park, Inc.*, omitted).

complained of simply did not violate the statute. *See, e.g., Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877, 880 (10th Cir. 1990) (citing *Patterson* and concluding that retaliation for complaint about racial harassment not unlawful because harassment "itself is not actionable under the statute.").[22]

Pre-*Patterson* decisions also held that race-based retaliation was unlawful. The lower courts reasoned that because it was unlawful to fire a worker because he or she was black, it was also illegal to fire black – but not white – workers for complaining about company practices.[23] After *Patterson*, because an employer did not violate section 1981 by firing all black workers because of their race, it was also legal to single out and dismiss particular black workers who had complained or filed lawsuits. In this regard, the effect of *Patterson* was to limit race-based retaliation claims

---

[22] Not all lower courts foreclosed the possibility that after *Patterson* workers were still protected from retaliation for exercising their section 1981 right to enforce a contract. *See, e.g., Malhotra*, 885 F.2d at 1313; *McKnight*, 908 F.2d at 111-12.

[23] *See, e.g., London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981) ("If an employer retaliates against the former employee with the intent to perpetuate the original act of discrimination, or with some other racially discriminatory motive in mind, then interference with rights protected by § 1981 has occurred, and that section must come into play."); *Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 80 F.R.D. 254, 266 (N.D. Ill. 1978) ("where, as here, the retaliation is alleged to have been motivated by racial discrimination . . . a § 1981 claim can be stated.").

unrelated to contract enforcement, to race-based retaliation in hiring.[24]

Patterson unquestionably changed the landscape for retaliation claims under section 1981. After *Patterson*, section 1981's anti-retaliation protections were no longer applicable to most of the situations in which a worker opposed racial discrimination because most of those situations involved post-formation conduct. The 1991 Act, by amending section 1981 to apply to post-formation conduct, including dismissals, restored the applicability of section 1981 protections to a far wider range of cases. For example, after *Patterson*, Humphries would not have been able to bring his claim that Cracker Barrel interfered with his right to enjoy the benefits of the contract because Cracker Barrel bestowed those benefits post-formation. But after the 1991 Act expanded section 1981's protections to cover post-formation conduct, specifically protecting the right to enjoy the benefits of the contract regardless of race, Humphries' claim became viable.

Because the 1991 Act made clear that section 1981's rights extend to post-formation conduct, no additional language was necessary to protect against all impairments of those rights, including reprisals

---

[24] *See, e.g., English v. Gen. Dev. Corp.*, 717 F. Supp. 628, 632 (N.D. Ill. 1989) (upholding claim by employees allegedly discharged because they objected to employer's policy of racial discrimination in the formation of contracts).

for exercising those rights. Contrary to petitioner's assertions, *Patterson* did not require otherwise. The *Patterson* Court dismissed plaintiff's racial harassment claim because the racial harassment complained of did not involve either "making" or "enforcing" a contract, and not because section 1981 did not include the words "racial harassment." *See* 491 U.S. at 177-78. Importantly, the Court did recognize that Patterson's claim for failure to promote might be actionable under section 1981 – even though those words do not appear in the statute – if "the nature of the change in position was such that it involved the opportunity to enter a new contract with the employer." *Id.* at 185. Thus, in light of *Patterson's* construction of section 1981, Congress would not reasonably conclude that it needed to amend section 1981 to add specific causes of action for racial harassment, failure to promote, retaliation, or any other particular interference with section 1981 rights, so long as the complained of conduct impaired rights recognized in the statute. Instead, Congress understood – consistent with the understanding of the lower Courts both before and after *Patterson* – that it needed to define the enumerated rights more expansively so that a broader range of conduct would "fall within" them.

The legislative history of the 1991 Act confirms this construction. *See, e.g.*, H.R. REP. NO. 102-40, pt. 1, at 90 (1991) ("The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for

example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring."); *id.* at 92 ("In cutting back the scope of the rights to 'make' and 'enforce' contracts[,] *Patterson* also has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981. Section 210 would restore rights to sue for such retaliatory conduct.") (citations omitted). The House Committee Report reflects a sound congressional understanding that by amending section 1981 and expanding the scope of its prohibition against discrimination, the 1991 Act greatly increased the range of situations to which section 1981's protection against retaliation would apply.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

CYNTHIA H. HYNDMAN
Counsel of Record
ALEEZA M. STRUBEL
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

ERIC SCHNAPPER
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, Washington 98185
(206) 616-3167

CAROLYN SHAPIRO
CHICAGO-KENT COLLEGE OF LAW
ILLINOIS INSTITUTE OF TECHNOLOGY
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5392

December 27, 2007

58473

82 37pgs (13) No. 06-1431

FILED
JAN 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

Michael W. Hawkins
Counsel of Record
Michael J. Newman
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Michael Zylstra
General Counsel and
Vice President
CBOCS West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, TN 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

Counsel for Petitioner CBOCS West, Inc.

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

ARGUMENT 1

I. RESPONDENT CONFUSES THE ISSUE IN THIS CASE BY ATTEMPTING TO REVIVE A RACIAL DISCRIMINATION CLAIM UNDER THE GUISE OF RETALIATION .. 3

II. RESPONDENT IGNORES THE TEXT OF SECTION 1981 BY SUGGESTING THAT IT CREATES RIGHTS THAT ARE NOT MODIFIED BY THE CLAUSE "AS IS ENJOYED BY WHITE CITIZENS." 8

III. RESPONDENT'S AND THE GOVERNMENT'S APPARENT RELIANCE ON 42 U.S.C. § 1981(c) AND 42 U.S.C. § 1981a TO SUPPORT THEIR CONCLUSION IS MISPLACED 11

IV. RESPONDENT'S POLICY ARGUMENTS FAIL AS A MATTER OF PRINCIPLE BECAUSE THE JUDICIARY CANNOT CREATE AN ENTIRELY NEW CLAUSE IN SECTION 1981 14

V. RESPONDENT'S ATTEMPTED RELIANCE ON *STARE DECISIS* IS FLAWED 19

VI. RESPONDENT'S CREATION OF FACTS AND NEW ALLEGATIONS IN HIS BRIEF APPEARS TO BE AN ATTEMPT TO MOVE THE FOCUS OF THE CASE AWAY FROM THE QUESTION PRESENTED 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Bate Refrigerating Co. v. Sulzberger,
157 U.S. 1 (1894) 10, 22

Bolden v. City of Topeka,
441 F.3d 1129 (10th Cir. 2006) 11

Burlington N. & Santa Fe Ry. Co. v. White,
__ U.S. __, 126 S. Ct. 2405 (2006) 1, 4, 10

Burnet v. Colorado Oil & Gas Co.,
285 U.S. 393 (1932) 21

Butts v. County of Volusia,
222 F.3d 891 (11th Cir. 2000) 11

Caminetti v. United States,
242 U.S. 470 (1927) 10, 22

Chapman v. Higbee Co.,
319 F.3d 825 (6th Cir. 2003) 11

Cont'l T.V., Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977) 21

Dana Tank Container v. Human Rights Comm'n,
687 N.E.2d 102 (Ill. App. Ct. 1997) 17

Dennis v. County of Fairfax,
55 F.3d 151 (4th Cir. 1995) 11

Domino's Pizza, Inc. v. McDonald,
546 U.S. 470 (2006) ..... *passim*

Georgia v. Rachel,
384 U.S. 780 (1966) 8, 9, 12, 18

Hart v. Transit Mgt. of Racine, Inc.,
426 F.3d 863 (7th Cir. 2005) 24

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 9, 10, 22

Helvering v. Hallock,
309 U.S. 106 (1940) 21

Hormel v. Helvering,
312 U.S. 552 (1941) 24

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 9

Hurd v. Hodge,
334 U.S. 24 (1948) 5

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) ..... *passim*

Lake County v. Rollins,
130 U.S. 662 (1889) 10, 22

Lamie v. United States Trustee,
540 U.S. 526 (2004) 9, 22

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 8, 9, 12, 18

Oden v. Oktibbeha County,
246 F.3d 458 (5th Cir. 2001) 11

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) ..... *passim*

Payne v. Tennessee,
501 U.S. 808 (1991) 21

Phillips v. Martin Marietta Corp.,
400 U.S. 542 (1970) 6

Planned Parenthood of Southeastern Penn. v. Casey,
505 U.S. 833 (1992) 21

Runyon v. McCarey,
427 U.S. 160 (1976) ..... *passim*

Singelton v. Wulff,
428 U.S 106 (1976) 23

Smith v. Allwright,
321 U.S. 649 (1944) 21

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) ..... *passim*

United States v. Ron Pair Enter., Inc.,
489 U.S. 235 (1989) 10, 22

Vasquez v. Hillery,
474 U.S. 254 (1986) 20

CONSTITUTION

U.S. CONST. ART. I 2, 14, 15, 19

U.S. CONST. ART. III 2

STATUTES AND REGULATIONS

2 U.S.C. § 1317(a) (2006) 13

20 U.S.C. § 1681 *et seq.* (2006) 20

42 U.S.C. § 1981 (2006) ..... *passim*

42 U.S.C. § 1981a (2006) 11, 13, 14

42 U.S.C. § 1982 (2006) 6, 20

42 U.S.C. § 2000e-3(a) (2006) 15, 16, 17, 18

775 ILL. COMP. STAT. 5/6-101(A) (2008) 17

ALASKA STAT. § 18.80.220(a)(4) (Michie 2007) ... 16

ARIZ. REV. STAT. § 41-1464(A) (2007) 16

CAL. GOV'T CODE § 12940(h) (Deering 2007) 16

COLO. REV. STAT. § 24-34-402(1)(e)(IV) (2007) ... 16

IOWA CODE § 216.11 (2006) 16

MD. CODE ANN., art. 49B § 16(f) (2007) 16

MASS. ANN. LAWS ch. 151B, § 4
(Law Co-op. 2007) 16

MO. REV. STAT. § 213.070(2) (2007) 16

N.J. STAT. ANN. § 10:5-12(d) (2007) 16

N.M. STAT. ANN. § 28-1-7 (Michie 2007) 16

N.Y. EXECUTIVE LAW § 296(1)(e)
(Consol. 2007) 16

NEV. REV. STAT. ANN. 613.340(1)
(Michie 2007) 16

OHIO REV. CODE ANN. § 4112.02(I)
(Anderson 2007) 16

OR. REV. STAT. § 659A.030(1)(f) (2005) 16

VT. STAT. ANN. tit. 21 § 495(a)(5) (2007) 16

W. VA. CODE ANN. § 5-11-9(7)(C)
(Michie 2007) 16

WIS. STAT. § 111.322(2m)-(3) (2006) 16

MISCELLANEOUS

BLACK'S LAW DICTIONARY 545 (7th ed. 1999)
(defining "employment at will") 25

Civil Rights Act of 1991, Pub. L. 102-166,
105 Stat. 1071, Tit. III, § 312 ..... 13, 18

THE FEDERALIST NO. 47 (James Madison)
(Phoenix Press Paperback ed., 2000) 15

THE FEDERALIST NO. 78 (Alexander Hamilton)
(Phoenix Press Paperback ed., 2000) 15

ARGUMENT

This case presents only one legal issue for this Court's analysis – whether a cause of action based on retaliation is cognizable under 42 U.S.C. § 1981 ("Section 1981"). Respondent and his *amici*, however, divert attention away from the clear language of Section 1981, which does not protect against retaliation, instead focusing on racial discrimination and various policy issues. Respondent does not address the distinction Congress and this Court have recognized between discrimination based on an individual's status and retaliation based on an individual's conduct. *See Burlington N. and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 412, ___ U.S. ___ (2006) (noting Congress' distinction between discrimination and retaliation in Title VII – "[t]he substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.") (Breyer, J.). Furthermore, Respondent does not address the same distinction he, in fact, recognized in all lower court proceedings in this case.

Unable to find any reference to retaliation in Section 1981's text, Respondent relies on the proposition that Section 1981 creates rights that do not depend on the existence of racial discrimination. *See* Resp. Br. 15-31. Respondent ignores the modifying phrase "as is enjoyed by white citizens" that specifically defines and limits the application and scope of Section 1981. This language, as determined when reviewing Section 1981, limits any cause of

action under Section 1981 to racial discrimination in the making and enforcement of contracts, and as such excludes retaliation.

Because Section 1981 does not protect against retaliation, Respondent asks this Court to construe Section 1981 to include such protection. Resp. Br. 38. Respondent claims that such a construction is necessary in order to effectuate a policy interest found within Section 1981. Respondent's policy arguments for this proposition, however, fail because they require this Court to disregard its constitutional powers and infringe on those powers the Constitution provides to Congress. *Compare* U.S. CONST. ART. I, *with* U.S. CONST. ART. III.

Respondent continues his argument by relying on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 299 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), claiming that *stare decisis* requires this Court to affirm the Seventh Circuit's decision. Petitioner will briefly address Respondent and *amici*'s erroneous reliance on these two cases and their attempt to invoke *stare decisis*, which is inappropriate in this case.

Finally, Respondent attempts to divert this Court's attention by inaccurately stating his allegations as pled and argued below, as well as the lower courts' holdings in this case. Respondent's descriptions of racial discrimination, both in theory and as alleged at the District Court, are irrelevant to the issue before the Court given the procedural history of this case. Respondent's only remaining cause of action (despite suggestions to the contrary) is retaliation, a cause of

action that does not exist under the plain language of Section 1981.

Petitioner requests only that this Court overrule the Seventh Circuit's decision, which, without any textual support, created a cause of action based on retaliation under Section 1981. In this case, the Seventh Circuit overstepped its constitutional powers and infringed on those lawmaking powers reserved to Congress, an act this Court should not allow.

I. RESPONDENT CONFUSES THE ISSUE IN THIS CASE BY ATTEMPTING TO REVIVE A RACIAL DISCRIMINATION CLAIM UNDER THE GUISE OF RETALIATION.

Petitioner supports civil rights and equality, and there is no question that Section 1981 "reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension." *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). Section 1981, however, "is only one part of Congress' extensive civil rights legislation," *see id.*, and it does not provide for a cause of action based on retaliation. Indeed, as recently as 2006, this Court noted that Section 1981 was not "meant to provide an omnibus remedy for all racial injustice." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006). As Justice Kennedy stated in *Patterson*, 491 U.S. at 185 n. 6, the task of the Court "is not to construe § 1981 to punish all acts of discrimination in contracting in a like fashion, but rather merely to give a fair reading to [the] scope of the statutory terms used by Congress." A fair reading of Section 1981 leads to

the reasonable conclusion that it does not protect against retaliation.

Respondent ignores Section 1981's text and begins his argument by suggesting that *Burlington Northern*, 126 S. Ct. at 2412, stands for the proposition that Section 1981 prevents injury based on both an individual's status and his conduct. Resp. Br. 15. *Burlington* does not stand for this proposition, and Section 1981's language does not support such a conclusion. The language cited by Respondent is language used by this Court, when analyzing Title VII, to note the distinction Congress has made between discrimination based on a protected category/class and retaliation based on an individual's conduct – a necessary and proper distinction for a full analysis of the arguments in this case. *See Burlington N.*, 126 S. Ct. at 2412 ("The substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.") (Breyer, J.).

Respondent attempts to link a retaliation claim to Section 1981 by referring to retaliation, but, in actuality, describing examples of racial discrimination. Resp. Br. 12 ("Section 1981 prohibits treating a subset of black workers differently than comparable white workers. . . . It cannot fire black complainers, but not white complainers"); Resp. Br. 23 ("The statute thus bars an employer from carrying out a policy of forbidding black but not white workers from 'giv[ing]' evidence."); Resp. Br. 23 ("Section 1981 would be violated if, in order to prevent blacks from testifying, an employer refused to give the black (but not white)

employees the time off from work necessary to testify, or hired thugs to physically bar black workers from entering the courthouse."); Resp. Br. 23-24 ("Section 1981 would equally be violated if [an] employer, after its workers had succeeded in giving evidence, singled out and dismissed the black workers who had done so."); Resp. Br. 27 ("If . . . [Petitioner] retaliated against [Respondent] because he was a black worker who exercised his right to enjoy that benefit, that reprisal also violated section 1981."[1]); Resp. Br. 32 ("[S]ection 1981 requires that [Petitioner] treat black and white complainants alike"); Resp. Br. 33 ("[S]ection 1981 forbids an employer from having one dismissal policy for blacks who complain about race discrimination, and another for whites who complain about such discrimination."). Petitioner does not dispute that Section 1981 forbids treating an African American differently than a Caucasian in the making and enforcing of contracts. That, however, is not the issue before this Court.

Indeed, much of the case law Respondent relies upon describes racial discrimination, not retaliation. *See e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (private schools violated Section 1981 by denying students "admission to the schools because of [the students'] race"); *Hurd v. Hodge*, 334 U.S. 24, 34 (1948) ("Solely because of their race and color [Petitioners were] confronted with orders of court

---

[1] Petitioner excludes the language "as is alleged here" from this quotation because, as is explained later in this Reply Brief, Respondent did not allege what he claims to allege in this statement.

divesting their titles in the properties and ordering that the premises be vacated," a violation of 42 U.S.C. § 1982).

Respondent even analogizes a Title VII gender discrimination case, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970), to his case. Resp. Br. 32-33. *Martin Marietta* is a gender discrimination case (not a retaliation case) in which this Court found that Title VII's discrimination provision forbids an employer from having "one hiring policy for women and another for men – each having pre-school-age children." *Martin Marietta*, 400 U.S. at 543. In analogizing *Martin Marietta* to Respondent's case, Respondent argues that it would be a Section 1981 violation to retaliate against African American employees who complain, but not Caucasian employees who complain. Petitioner agrees that such facts would state a claim for racial discrimination under Section 1981 because the employer would be treating a subset of African Americans differently than a subset of similarly situated Caucasians. However, Respondent's only remaining claim is one based on retaliation, not racial discrimination.

The above demonstrates that Respondent is confusing the question presented by masking his only remaining claim – a retaliation claim – as a newly formulated racial discrimination claim. The District Court and Seventh Circuit have both held that Respondent abandoned all claims based on racial discrimination. *See* JA 115 ("Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the

presentation he makes in his opposition papers that only the retaliation claim has any vitality."); JA 158 ("We agree with the district court's determination that [Respondent] waived . . . his discrimination claim by devoting only a skeletal argument in response to [Petitioner's] motion for summary judgment."). Respondent has not appealed his racial discrimination claims.

While attempting to turn his retaliation claim into a racial discrimination claim, Respondent fails to reconcile his newly formulated cause of action with his previous admissions and pleadings, which illustrate his clear understanding of the difference between retaliation and racial discrimination. *See* Resp. Br. 26 ("The First Amended Complaint alleges that [Petitioner] retaliated against [Respondent] for making . . . complaints."); Resp. Br. 35 ("[Respondent] contends that [Petitioner] retaliated against him because he opposed acts of racial discrimination"). *See also* JA 50-52 (Respondent distinguishing between retaliation and racial discrimination in his Complaint); R. 52 (6/28/05, Plaintiff's Response to Defendant's Motion for Summary Judgment) (distinguishing between retaliation and racial discrimination); 12/19/05, Plaintiff-Appellant's Brief and Required Short Appendix (distinguishing between retaliation and racial discrimination before the Seventh Circuit); 2/1/06, Plaintiff-Appellant's Reply Brief (distinguishing between retaliation and racial discrimination before the Seventh Circuit).

Despite Respondent's arguments to the contrary, it is clear that Section 1981 only protects against racial discrimination (not retaliation) in the "making and

enforcing" of contracts. *See Domino's Pizza*, 546 U.S. at 476 ("Section 1981 offers relief when **racial discrimination** blocks the creation of a contractual relationship, as well as when **racial discrimination** impairs an existing contractual relationship") (emphasis added); *Patterson*, 491 U.S. at 171 (Section 1981 "prohibits racial discrimination in the making and enforcing of private contracts") (internal quotation omitted); *Runyon*, 427 U.S. at 168 (Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-287 (1976) (Section 1981 is applicable to "racial discrimination"); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (noting the "racial character" of the the phrase "as is enjoyed by white citizens," which is used in section 1981).

As explained in Petitioner's Merits Brief and in this Reply to Respondent's Brief, the language of Section 1981 does not provide for a cause of action based on retaliation as Respondent asserts. In fact, Respondent's analysis suggests that he, too, is aware of Section 1981's scope.

II. RESPONDENT IGNORES THE TEXT OF SECTION 1981 BY SUGGESTING THAT IT CREATES RIGHTS THAT ARE NOT MODIFIED BY THE CLAUSE "AS IS ENJOYED BY WHITE CITIZENS."

Respondent focuses much of his Brief on what he terms the "rights-creating language" of Section 1981. Resp. Br. 15-31. Respondent and his *amici*, however, exclude from their analysis the specific modifying

language in Section 1981 – "as is enjoyed by white citizens."

As explained above, Section 1981 has consistently been read as a statute forbidding racial discrimination in the making and enforcement of contracts. *See Domino's Pizza*, 546 U.S. at 476; *Patterson*, 491 U.S. at 171; *Runyon*, 427 U.S. at 168; *Santa Fe Trail Transp.*, 427 U.S. at 286-287; *Rachel*, 384 U.S. at 791. Respondent's argument would require the Court to redact from Section 1981 the specific phrase "as is enjoyed by white citizens" in order to create a more favorable reading for Respondent. The phrase is clear and absolutely essential for an understanding of Section 1981's scope.

Section 1981 has not been, nor can it be, read as a statute creating rights not subject to the modifier "as is enjoyed by white citizens." Respondent cites to the Labor-Management Reporting and Disclosure Act and the First, Fifth, and Sixth Amendments of the Constitution to support the idea that certain acts of retaliation for exercising a right can be actionable. *See* Resp. Br. 19-20. By comparing these statutory and constitutional provisions to Section 1981, Respondent is asking the Court to ignore a clear modifier in Section 1981 – "as is enjoyed by white citizens."

The Court, however, cannot ignore the express language adopted by Congress. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, [the Court's] analysis begins with 'the language of the statute.'"). *See also Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters*

Bank, N.A., 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1927); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1894); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Section 1981 specifically prohibits racially discriminatory behavior where such behavior denies an individual the ability to make and enforce a contract. A broader finding would ignore the distinction between anti-discrimination provisions and anti-retaliation provisions that Congress made in drafting Section 1981 and Title VII, and the distinction this Court made in *Burlington Northern*, 126 S. Ct. at 2412.

Respondent's only surviving cause of action cannot, and does not, allege any type of racial discrimination behind Petitioner's decision to terminate Respondent. *See* JA 115 and 158. Respondent's allegations state that his retaliation claim stems from his manager's alleged dissatisfaction with him raising concerns "outside of management." JA 49 (Respondent's Complaint). In other words, Respondent's retaliation claim has nothing to do with race, but only the alleged fact that he went "outside of management" or "outside the chain of command" when he complained.

Respondent's claim is simply insufficient to satisfy the basic statutory prerequisites of Section 1981 (*i.e.*, racial discrimination), and his proposal to exclude or ignore a modifier that Congress chose to include is contrary to Section 1981's plain language.

III. RESPONDENT'S AND THE GOVERNMENT'S APPARENT RELIANCE ON 42 U.S.C. § 1981(c) AND 42 U.S.C. § 1981a TO SUPPORT THEIR CONCLUSION IS MISPLACED.

Respondent and the Government appear to suggest two additional arguments to support the idea that Section 1981 should be read to support a cause of action based on retaliation. Both suggestions, however, fail when properly analyzed.

First, both Respondent and the Government appear to suggest that 42 U.S.C. § 1981(c) provides support for Respondent's retaliation claim. Resp. Br. 16; United States Amicus Br. 17. Section 1981(c) states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination . . . ." 24 U.S.C. § 1981(c).

This argument ignores the consistent holdings of lower courts that 42 U.S.C. § 1981(c) merely codifies the Court's holding in *Runyon*, 427 U.S. at 168, that Section 1981 applies to private, as well as governmental, actors. *See Dennis v. County of Fairfax*, 55 F.3d 151, 156 n. 1 (4th Cir. 1995); *Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir. 2001); *Chapman v. Higbee Co.*, 319 F.3d 825, 841 (6th Cir. 2003); *Bolden v. City of Topeka*, 441 F.3d 1129, 1136 (10th Cir. 2006); *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000). Respondent and the Government even acknowledge Section 1981(c)'s codification of previous Supreme Court holdings that make Section 1981 applicable to private entities. Resp. Br. 3; United States Amicus Br. 22 n. 9.

More importantly, based on its text, Section 1981(c) does not protect individuals from retaliation. Section 1981(c) refers to "the rights protected by this section," namely Sections 1981(a) and (b). Those rights include, relevant to this case, the right to "make and enforce contracts" free from racial discrimination. Section 1981(c) makes clear that such "rights" are now statutorily protected against discrimination by private parties, as well as parties acting "under the color of state law." Nothing in Section 1981(c) divests Section 1981 of the clear modifier in Section 1981(a) – "as is enjoyed by white citizens." In *Domino's Pizza*, 546 U.S. at 476, this Court stated that where a party alleges that his/her "rights" have been impaired, just as Section 1981(c) states, Section 1981 still requires the impairment to be the result of "racial discrimination." It is axiomatic that Section 1981 requires the pleading and proof of racial discrimination. *See id.* (Section 1981 offers relief "when **racial discrimination** impairs an existing contractural relationship") (emphasis added). *See also Patterson*, 491 U.S. at 171; *Runyon*, 427 U.S. at 168; *Santa Fe Trail Transp.*, 427 U.S. at 286-287; *Rachel*, 384 U.S. at 791.

This line of reasoning actually highlights Petitioner's argument that if Congress wanted to include a cause of action based on retaliation in Section 1981, it should have codified it. Congress clearly chose to codify the principle that Section 1981 applies to private actors. *See* 42 U.S.C. § 1981(c). Congress certainly could have codified the principle for which Respondent argues – that Section 1981 protects against retaliation. The only relevant source of Congress' intent, however, is the language it created in

Section 1981 and its *corpus juris*. In Section 1981, Congress did not create protections against retaliation, even though it chose to enact an anti-retaliation provision in another part of the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. III, § 312 (repealed 1995)[2] (prohibiting "[a]ny intimidation of, or reprisal against," Senate employees for exercising rights under the Government Employee Rights Act of 1991). The fact that Congress chose to codify select aspects of Supreme Court holdings within Section 1981 (*i.e.*, *Runyon*, 427 U.S. at 168) and not what Respondent now argues in favor of (*i.e.*, retaliation) is evidence that Congress intended to exclude the protections Respondent seeks.

Second, Respondent and the Government both suggest that 42 U.S.C. § 1981a(4), which clarifies that damage limitations for Title VII shall not apply to Section 1981, provides support for the proposition that Congress intended Section 1981 and Title VII to coexist. Resp. Br. 42-43; United States Amicus Br. 29. *See also* 42 U.S.C. § 1981a(4) (2006) ("Nothing in this section shall be construed to limit the scope of, or the relief available under . . . 42 U.S.C. § 1981."). It is erroneous, however, to conclude that this congressional statement creates a complete overlap between Section 1981 and Title VII, which Respondent now seeks to use to create identical causes of action in Section 1981 and Title VII. The overlap Respondent and the Government ask this Court to endorse would completely nullify Congress' clear statement in Title

---

[2] Section 1317(a) of Chapter 2 of the United States Code now protects all congressional employees against retaliation.

VII that damages for retaliation in the employment context be capped. *See* 42 U.S.C. § 1981a(b)(3) (2006). Respondent and his *amici* request that this Court abolish Congress' chosen damages caps for Title VII in favor of Respondent's proposed creation of a Section 1981 umbrella for all claims remotely related to race in the employment context. This creates an absurd result and nullifies Congress' preference for limitations on damages in the employment context for retaliation.

Respondent can find no reasonable textual support for his retaliation claim under Section 1981. The above arguments reach far beyond the actual text of Section 1981 and do not support Respondent's proposed conclusion.

IV. RESPONDENT'S POLICY ARGUMENTS FAIL AS A MATTER OF PRINCIPLE BECAUSE THE JUDICIARY CANNOT CREATE AN ENTIRELY NEW CLAUSE IN SECTION 1981.

Respondent further contends that "[S]ection 1981's prohibition against race discrimination should be construed to forbid discrimination against an individual because he or she opposed race discrimination." Resp. Br. 38. Taken to its logical conclusion, Respondent's argument must fail because it asks the Court to ignore Section 1981's text and to create an entirely new clause under Section 1981. Respondent's argument in favor of a cause of action based on retaliation has no boundaries, and to create such boundaries, this Court must draft legislation, a power only Congress may exercise. *See* U.S. CONST. ART. I, § 1.

Under Title VII, for example, the anti-retaliation clause Congress enacted states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). This illustrates that Congress took the time to define what constitutes protected activity under Title VII, thus delineating what conduct an employee could engage in and thereby receive protection against retaliation. Section 1981 currently has no such defining provision and/or operative language. The Seventh Circuit, nonetheless, stepped into Congress' shoes and stated simply that Section 1981 protects against retaliation. The Seventh Circuit, however, did not and cannot delineate the boundaries of such a holding. That is a task for Congress. *See* U.S. CONST. ART. I, § 1. Respondent's suggestion that this Court should do the same is contrary to our system of government. *See* THE FEDERALIST NO. 47, at 249 (James Madison) (Phoenix Press Paperback ed., 2000) (quoting Charles Montesquieu for the importance of separation of powers – "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*"); THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) ("The legislature not only commands the purse but

prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . can take no active resolution whatever."; *id.*, at 403 (noting the benefits of the integrity and moderation of the judiciary, Alexander Hamilton said that "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today").

Respondent and his *amici* base much of their policy arguments, as did the Seventh Circuit, on the premise that without protection against retaliation, Section 1981 will become a dead letter. Respondent argues that absent the Court's creation of an anti-retaliation provision in Section 1981, employers will freely retaliate against employees. *See* Resp. Br. 38-39. *See also* United States Amicus Br. 27-31. This conclusion ignores the extensive body of civil rights legislation and case law at both the federal and state levels that prohibits retaliation by employers against employees for complaining about discrimination. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (2006); ALASKA STAT. § 18.80.220(a)(4) (Michie 2007); ARIZ. REV. STAT. § 41-1464(A) (2007); CAL. GOV'T CODE § 12940(h) (Deering 2007); COLO. REV. STAT. § 24-34-402(1)(e)(IV) (2007); IOWA CODE § 216.11 (2006); MD. CODE ANN., art. 49B § 16(f) (2007); MASS. ANN. LAWS ch. 151B, § 4 (Law Co-op. 2007); MO. REV. STAT. § 213.070(2) (2007); N.J. STAT. ANN. § 10:5-12(d) (2007); N.M. STAT. ANN. § 28-1-7 (Michie 2007); N.Y. EXECUTIVE LAW § 296(1)(e) (Consol. 2007); NEV. REV. STAT. ANN. 613.340(1) (Michie 2007); OHIO REV. CODE ANN. § 4112.02(I) (Anderson 2007); OR. REV. STAT. § 659A.030(1)(f) (2005); VT. STAT. ANN. tit. 21 § 495(a)(5) (2007); W. VA. CODE ANN. § 5-11-9(7)(C) (Michie 2007); WIS. STAT. § 111.322(2m)-(3) (2006).

In fact, in Illinois, the state in which Respondent alleges Petitioner retaliated against him, regardless of an employer's size, an employee can file suit against an employer for retaliating against him/her for alleging racial discrimination. *See Dana Tank Container v. Human Rights Comm'n*, 687 N.E.2d 102 (Ill. App. Ct. 1997) (holding that an employer not subject to racial discrimination laws of Illinois because it had too few employees was nonetheless liable for retaliation). *See also* 775 ILL. COMP. STAT. 5/6-101(A) (2008) ("It is a civil rights violation for a person, or for two or more persons to conspire, to . . . [r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination . . . or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act.").

It defies logic to suggest that employers will adopt policies promoting retaliation because this Court holds in this case that Section 1981 does not allow for a cause of action based on retaliation. Indeed, Respondent was protected, both under Illinois and federal law, against the retaliation he alleges. *See* 775 ILL. COMP. STAT. 5/6-101(A); 42 U.S.C. § 2000e-3(a). As Respondent's claim relates to Title VII's anti-retaliation clause, Respondent failed to comply with its procedural requirement. JA 84-92. There is a fabric of civil rights laws that protects against retaliation in the employment context, and Section 1981 should not be read to subsume and nullify all such statutes. *Domino's Pizza,* 546 U.S. at 479 (Section 1981 was not "meant to provide an omnibus remedy for all racial injustice"); *Patterson*, 491 U.S. at 188 (Section 1981 "is

only one part of Congress' extensive civil rights legislation").

To endorse the argument that Section 1981 would become a dead letter without protection against retaliation, the Court would have to create the boundaries for such protection. Under Title VII, an individual is protected against retaliation if he/she testifies at a hearing or during an investigation of an alleged incident of racial discrimination. 42 U.S.C. § 2000e-3(a). Based on Respondent's logic, this same individual should be protected under Section 1981 because it would allegedly encourage compliance with Section 1981. However, this individual would then have a cause of action under Section 1981 irrespective of his/her race and/or the existence of racial discrimination. *See Domino's Pizza*, 546 U.S. at 476 (noting that racial discrimination is necessary for a cause of action under Section 1981). *See also Patterson*, 491 U.S. at 171; *Runyon*, 427 U.S. at 168; *Santa Fe Trail Transp.*, 427 U.S. at 286-287; *Rachel*, 384 U.S. at 791. He/she would also have a cause of action under Section 1981 without even alleging the existence of a contract. *See Domino's Pizza*, 546 U.S. at 476 ("Any claim brought under § 1981 . . . must initially identify an impaired 'contractual relationship . . . under which the plaintiff has rights.").

Respondent's position would require this Court to draft an operative anti-retaliation clause in Section 1981, which would have no cap on damages. Congress, as delineated in Petitioner's Merits Brief, has consistently included anti-retaliation clauses in anti-discrimination statutes where it chooses to do so. Pet. Br. 15-18. *See also* Civil Rights Act of 1991, Pub. L.

102-166, 105 Stat. 1071, Title III, § 312 (Congress creating an anti-retaliation provision in another part of the Civil Rights Act of 1991). It is not the role, nor the right, of a court to create such a clause as the Seventh Circuit did in this case. *See* U.S. CONST. ART. I, § 1.

Accordingly, this Court should not endorse Respondent's position, and it should reverse the Seventh Circuit.

V. RESPONDENT'S ATTEMPTED RELIANCE ON *STARE DECISIS* IS FLAWED.

Respondent and his *amici*, particularly the Government, contend that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), require this Court to affirm the Seventh Circuit's decision in the case at bar. *See* Resp. Br. 35-39; United States Amicus Br. 13-19. This is an attempt to invoke principles of *stare decisis* and proclaim that other cases addressing different factual circumstances, and different statutory provisions, necessitate an outcome favorable to Respondent. Such is not the case, nor should this Court entertain such an argument.[3]

Stare decisis promotes the adherence to precedent for the stability and predictability of Congress' body of

---

[3] Petitioner notes that some responses to this argument were addressed in its Merits Brief. Pet. Br. 33-39. In addition to those arguments, Petitioner is obligated to address the issue of *stare decisis* and its inapplicability to the case at bar.

law. *See Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). A decision of this Court that Section 1981 does not provide for a cause of action based on retaliation, however, does not conflict with either *Sullivan* or *Jackson*. *Sullivan* and *Jackson* deal with distinct factual circumstances – namely, *Sullivan* deals with property rights, and *Jackson* deals with gender discrimination by recipients of federal education funding. *Sullivan* and *Jackson* address separate and distinct statutes – namely, *Sullivan* addresses 42 U.S.C. § 1982, and *Jackson* addresses 20 U.S.C. § 1681 *et seq.*, otherwise known as Title IX. Neither 42 U.S.C. § 1982 nor Title IX were amended in the Civil Rights Act of 1991, as Section 1981 was, when Congress knew this Court would analyze its statutes based on the statutes' text. Also, as explained in Petitioner's Merits Brief, Respondent's argument concerning Section 1981 implicates and affects Title VII and all other fair employment practice legislation enacted by the states in a way 42 U.S.C. § 1982 and Title IX do not. *See* Pet. Br. 33-39. The entire *corpus juris* created by Congress will be thrown into upheaval if the Court endorses Respondent's line of reasoning and ignores Section 1981's text: (1) citizens will be forced to guess and/or assume what Congress means in a statute, if Congress is not required to specifically state its intentions; and (2) Title VII's applicability to retaliation based on a complaint concerning racial discrimination, which currently limits damages for such a cause of action in the employment context, will be completely nullified. *See* Pet. Br. 21-33, 39-42. Because different statutory provisions protecting different wrongs are at issue in *Sullivan*, *Jackson*, and this case, *stare decisis* does not apply.

Furthermore, "*[s]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). *See also Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 n. 30 (1977); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 854 (1992) ("*stare decisis* is not an 'inexorable command'"). Where the Court examines prior holdings, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854. The Court may look at: (1) "whether related principles of law have so far developed as to have the old rule no more than a remnant of abandoned doctrine," *see Patterson*, 491 U.S. at 173-74; and (2) "whether facts have so changed, or come to be seen so differently as to have robbed the old rule of significant application or justification," *see Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 412 (1932). *Casey*, 505 U.S. at 854-55. Indeed, this Court has stated that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). This Court should not feel constrained to follow *Sullivan* or *Jackson* in this case where there is no textual support in Section 1981 for the Seventh Circuit's decision. By overruling the Seventh Circuit, this Court would be upholding one of the oldest and most important

principles of law in this Country – that courts are to enforce statutes according to their terms. *See Lamie*, 540 U.S. at 534; *Hartford Underwriters*, 530 U.S. at 6; *Ron Pair Enter.*, 489 U.S. at 241; *Caminetti*, 242 U.S. at 485; *Bate Refrigerating*, 157 U.S. at 33; *Rollins*, 130 U.S. at 670.

For these reasons, and those stated in Petitioner's Merits Brief, *stare decisis* does not apply, and this Court should reject the notion that *Sullivan* and *Jackson* govern the outcome in this case.

VI. RESPONDENT'S CREATION OF FACTS AND NEW ALLEGATIONS IN HIS BRIEF APPEARS TO BE AN ATTEMPT TO MOVE THE FOCUS OF THE CASE AWAY FROM THE QUESTION PRESENTED.

As mentioned at the outset of this Reply Brief, Respondent appears to ignore the issue in this case – namely, whether a cause of action for retaliation exists under Section 1981. Respondent not only avoids the real issue in this case, but Respondent continually points to alleged facts and findings to support his newly created arguments. However, many of those facts and findings are inaccurate and present arguments that were not present in Respondent's Complaint, nor in any pleading filed in this case that Petitioner can find. Accordingly, Petitioner addresses some of those inaccuracies below.

First, Respondent insists that "[o]n June 2, 2003, [Respondent] timely filed a *pro se* complaint, against [Petitioner], alleging race discrimination and retaliation under Title VII . . . ." Resp. Br. 6. This is

inaccurate and appears to be an effort to support Respondent's contention that he is not making an end-run around Title VII. The District Court, however, explicitly found that Respondent failed to timely file his Title VII claims. *See* JA 84-92. Respondent never appealed this issue.

Second, Respondent asserts that "[t]he Seventh Circuit acknowledged that [Petitioner] forfeited its argument about the viability of [Respondent's] section 1981 retaliation claim, but nevertheless chose to resolve the question 'in the interests of justice.'" Resp. Br. 8 n. 1. In the same vein, Respondent claims that "Petitioner's failure to raise [the] issue below makes this an inappropriate vehicle for consideration of the question presented." Id.

Despite Respondent's suggestions to the contrary, the Seventh Circuit never found, nor did it "acknowledge[]," that Petitioner forfeited its argument as to the viability of a retaliation cause of action under Section 1981. *See* JA 121-22. The Seventh Circuit specifically noted that it chose to address the issue presently at bar "irrespective of whether [Petitioner] forfeited the issue or not." JA 121-22 n. 1. As described in the Seventh Circuit's decision, there had been at least a perceived change in the law among practitioners and courts alike, JA 122, and this change required Petitioner to raise the narrow issue at the Seventh Circuit, which fully addressed it.

Additionally, the Seventh Circuit acted within its discretion when it decided to address whether Respondent has a cause of action based on retaliation under Section 1981. *See Singelton v. Wulff*, 428 U.S.

106, 120 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). *See also Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."). The facts of this case command resolution of this issue.

After the summary judgment briefing and immediately preceding the District Court's grant of summary judgment in favor of Petitioner, the Seventh Circuit issued *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (2005), which specifically stated:

> Retaliation is grounds for relief under Title VII of the Civil Rights Act of 1964, which makes it unlawful for any employer to discriminate against an employee for opposing a practice made unlawful by the Act, but § 1981, in contrast, encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination.

This new case law, as Petitioner argued, caused Respondent's appeal to the Seventh Circuit on the issue of retaliation to lack any merit. JA 121. Petitioner was required to specifically address this issue in defending against Respondent's appeal.

Furthermore, Petitioner, while not specifically addressing Section 1981 retaliation, raised a general defense to Respondent's claim before the District Court when Petitioner asserted in its answer that Respondent failed to state a claim upon which relief could be granted in this case. JA 77. The Seventh Circuit acted well within its discretionary power and in the interest of justice when it decided to address the issue brought before it in this case, *see* JA 121-23, and this Court should not endorse Respondent's waiver argument.

Third, Respondent has created an entirely new line of argument for his case before this Court. Respondent now appears to argue that Petitioner's Open Door Policy potentially created a contractual relationship between Petitioner and Respondent. *See* Resp. Br. 27-28. However, Respondent further acknowledges that he did not fully "develop[]" this issue at the District Court or on appeal. Resp. Br. 28 n. 8. Respondent did not fully develop this issue because it was never alleged in his Complaint. *See* JA 29-59 (Respondent's Complaint and Amended Complaint). Respondent's failure to raise this issue is further exemplified by the fact that he never disputed the "at-will nature of [his] employment" relationship with Petitioner. *See* JA 137 n. 7. "Employment at will" is "[e]mployment that is usu[ally] undertaken without a contract and that may be terminated at any time, by either the employer or the employee without cause." BLACK'S LAW DICTIONARY 545 (7th ed. 1999) (defining "employment at will").

Whether or not Petitioner allowed Respondent to "enforce" what he now attempts to claim was a

contract is irrelevant to the question at bar. The only issue is whether Respondent has a cause of action based on retaliation pursuant to Section 1981. Absent pleading and proving racial discrimination, which Respondent cannot do because he abandoned those claims, *see* JA 115 and 158, Respondent does not have a cause of action under Section 1981.

Finally, the arguments in Petitioner's Merits Brief are based on sound principles of statutory construction. Petitioner requests that this Court not give credence to Respondent's inaccurate characterizations of Petitioner's arguments. A noteworthy example of one such inaccuracy is where Respondent states: "[P]etitioner argues . . . that Congress intended Title VII – not any other statute – 'to govern claims of race discrimination and retaliation in the employment context.'" Resp. Br. 40.

Respondent takes Petitioner's statement completely out of context. To be precise, Petitioner made the following statement in Petitioner's Merits Brief: "The Seventh Circuit's decision threatens to eviscerate the administrative and procedural safeguards of Title VII that Congress specifically enacted to govern claims of race discrimination and retaliation in the employment context." Pet. Br. 9. It is beyond dispute that Title VII was enacted to specifically address employment discrimination and retaliation. The statement Respondent cites is part and parcel of Petitioner's argument that statutory construction demands a finding that Respondent does not have a cause of action under Section 1981 based on retaliation. *See* Pet. Br. 14-26.

CONCLUSION

Petitioner asks this Court to interpret Section 1981 as written. Section 1981's text does not, nor has it ever, provided for a cause of action based on retaliation. For the reasons stated in Petitioner's Merits Brief and this Reply Brief, the decision of the Seventh Circuit should be reversed.

Respectfully submitted,

MICHAEL W. HAWKINS
Counsel of Record
MICHAEL J. NEWMAN
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

MICHAEL ZYLSTRA
General Counsel and Vice President
CBOCS, West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, Tennessee 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

Counsel for Petitioner
CBOCS West, Inc.

Date: January 23, 2008.

5 75 3313

19

41 pp

No. 06-1431

In the Supreme Court of the United States

CBOCS WEST, INC., PETITIONER

v.

HENDRICK G. HUMPHRIES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record

GRACE CHUNG BECKER
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

DENNIS J. DIMSEY
LISA WILSON EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a claim asserting retaliation against an individual who has complained of intentional racial discrimination is cognizable under 42 U.S.C. 1981.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
Claims asserting retaliation because of complaints of intentional racial discrimination are cognizable under Section 1981 13
A. Retaliation because of complaints about racial discrimination impairs contract rights in violation of Section 1981's general anti-discrimination prohibition 13
B. The absence of a reference to retaliation is not dispositive in the context of a general prohibition on discrimination that lacks an express cause of action 19
C. The statutory history confirms that Section 1981 encompasses retaliation claims 21
D. Policy reasons recognized in *Jackson* support the conclusion that Section 1981 prohibits retaliation against those who complain about intentional racial discrimination against themselves or others 25
E. Section 1981's partial overlap with Title VII does not preclude retaliation claims here 27
F. This Court's decision in *Domino's Pizza* does not preclude retaliation claims under Section 1981 31
Conclusion 33

TABLE OF AUTHORITIES

Cases: Page

Aleman v. *Chugach Support Servs., Inc.*, 485 F.3d 206 (4th Cir. 2007) 25
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) .. 27
Andrews v. *Lakeshore Rehab. Hosp.*, 140 F.3d 1405 (11th Cir. 1998) 25
Brown v. *GSA*, 425 U.S. 820 (1976) 4
Burlington N. & Santa Fe Ry. v. *White*, 126 S. Ct. 2405 (2006) 32
Carter v. *South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990) 21
Choudhury v. *Polytechnic Inst.*, 735 F.2d 38 (2d Cir. 1984) 21
Civil Rights Cases, 109 U.S. 3 (1883) 31
Domino's Pizza, Inc. v. *McDonald*, 546 U.S. 470 (2006) 5, 12, 16, 22, 31
Foley v. *University of Houston Sys.*, 355 F.3d 333 (5th Cir. 2003) 25
Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) 19, 20
General Bldg. Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375 (1982) 3, 18, 29, 30
Goff v. *Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), overruled by *Carter* v. *South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990) 21
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987) 2
Jackson v. *Birmingham Bd. of Educ* , 544 U.S. 167 (2005) ..... *passim*
Jett v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) ... 3, 4

Cases—Continued: Page

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ..... *passim*
Johnson v. *University of Cincinnati*, 215 F.3d 561 (6th Cir.), cert. denied, 531 U.S. 1052 (2000) 25
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) 3, 18
Jones v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) 2, 4, 23
Ledbetter v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) 29
London v. *Coopers & Lybrand*, 644 F.2d 811 (9th Cir. 1981) 21
Manatt v. *Bank of Am., NA*, 339 F.3d 792 (9th Cir. 2003) 25
McDonald v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) 2, 26
Moore v. *Consolidated Edison Co.*, 409 F.3d 506 (2d Cir. 2005) 25
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) ..... *passim*
Randall v. *Sorrell*, 126 S. Ct. 2479 (2006) 19
Runyon v. *McCrary*, 427 U.S. 160 (1976) 18, 28
Saint Francis Coll. v. *Al-Khazraji*, 481 U.S. 604 (1987) 18
Shaare Tefila Cong. v. *Cobb*, 481 U.S. 615 (1987) 18
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 1, 4, 9, 13, 14, 31
Tillman v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) 18, 31

Cases—Continued: Page

Welch v. *Texas Dep't. of Highways & Pub. Transp.*, 483 U.S. 468 (1987) 16
Winston v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977) 21

Constitution and statutes:

U.S. Const.:
Amend. XIII 30
§ 2 7
Amend. XIV 3
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*:
29 U.S.C. 626(c) 21
29 U.S.C. 633a 20
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*:
42 U.S.C. 12117 21
42 U.S.C. 12133 21
42 U.S.C. 12188 21
42 U.S.C. 12203 21
Civil Rights Act of 1866, ch. 31, 14 Stat. 27 .... 7, 11, 18, 26
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
42 U.S.C. 2000e(b) 28
42 U.S.C. 2000e-3(a) (§ 704(a)) 19, 32
42 U.S.C. 2000e-5(f) 21
Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 ..... 4, 12

Statutes—Continued: Page

Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* ..... *passim*
20 U.S.C. 1681(a) 1, 15
Equal Pay Act of 1963, 29 U.S.C. 206(d) 29
Fair Labor Standards Act of 1938, 29 U.S.C. 216(b) 21
Family and Medical Leave Act of 1993, 29 U.S.C. 2617(a) 21
National Labor Relations Act, 29 U.S.C. 160(b) 21
Surface Transportation Assistance Act of 1982, 49 U.S.C. 31101 *et seq.*:
49 U.S.C. 31105(b) 21
49 U.S.C. 31105(c) 21
Uniformed Services Employment and Reemployment Act of 1994, 38 U.S.C. 4323(a) 21
42 U.S.C. 1981 ..... *passim*
42 U.S.C. 1981(a) 3, 4, 13, 16
42 U.S.C. 1981(b) 4, 5, 8, 22, 29, 31
42 U.S.C. 1981(c) 4, 5, 13, 16, 17, 22
42 U.S.C. 1981a(a)(1) 29
42 U.S.C. 1981a(b)(4) 29
42 U.S.C. 1982 ..... *passim*
42 U.S.C. 1983 4

Miscellaneous:

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 26

Miscellaneous—Continued: Page

Civil Rights Act of 1990, Hearing Before the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. (1990) 24

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1 (1991) 24

Robert J. Kaczorowksi, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986) 27

William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* (1995) 26

Jacobus tenBroek, *Equal Under Law* (rev. ed. 1965) ... 26

In the Supreme Court of the United States

No. 06-1431

CBOCS WEST, INC., PETITIONER

v.

HENDRICK G. HUMPHRIES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question presented in this case is whether a claim asserting retaliation against an individual who has complained of intentional racial discrimination is cognizable under 42 U.S.C. 1981. The United States has participated as amicus curiae in other cases presenting the question whether a statute's broad-based prohibition of discrimination encompasses a cause of action for retaliation because of complaints about discrimination. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a)), and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (42 U.S.C. 1982). The court of appeals' interpretation of Section 1981 in this case was

based in significant part on this Court's decisions in *Jackson* and *Sullivan*. See J.A. 138-144.

The United States has responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The availability of relief under Section 1981 for acts of racial discrimination in employment may affect the allocation of government resources in enforcing the provisions of Title VII. The United States has often participated as amicus curiae in cases involving Section 1981 where, as here, the Court's interpretation of Section 1981 could affect the interpretation or enforcement of statutes, like Title VII, that the United States enforces. See, *e.g.*, *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

STATEMENT

Respondent is an African-American man who was an associate manager at a Cracker Barrel restaurant owned and operated by petitioner. He alleges that petitioner violated 42 U.S.C. 1981 by retaliating against him because he had complained about racial discrimination against him and another black employee. The district court granted summary judgment for petitioner and dismissed the Section 1981 retaliation claim. On appeal, petitioner argued that Section 1981 does not provide a cause of action for retaliation claims. The court of appeals reversed the grant of summary judgment, holding that Section 1981 encompasses retaliation claims.

1. Section 1981(a) of Title 42 of the United States Code, one of the Nation's oldest civil rights laws, provides the following "[s]tatement of equal rights":

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens.

This Court has repeatedly "traced the evolution of this statute, and its companion, 42 U. S. C. § 1982." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 383-384 (1982). The "operative language of both laws apparently originated in § 1 of the Civil Rights Act of 1866, enacted by Congress shortly after ratification of the Thirteenth Amendment." *Id.* at 384 (internal citation omitted). The language now contained in Section 1981(a) "is derived from § 1977 of the Revised Statutes of 1874, which in turn codified verbatim § 16" of the Enforcement Act of 1870 (itself a product of Congress's powers to enforce the Fourteenth Amendment). *Id.* at 385. Accordingly, the Court has "recognized that present day 42 U. S. C. § 1981 is both a Thirteenth and a Fourteenth Amendment statute." *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989) (plurality opinion).

From Section 1981(a)'s general statement of equal rights, this Court has inferred a cause of action for claims that private parties have engaged in intentional racial discrimination. It first inferred such a cause of action from the parallel "same right" language of Section 1982, which gives "[a]ll citizens" the "same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property." See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 (1968) (authorizing enforcement of Section 1982

by suit for an injunction); see also *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969) (Section 1982 suit for damages). Later, it expressly applied that reasoning to Section 1981, holding that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory, and under certain circumstances, punitive damages." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).[1]

In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), after requesting additional briefing and argument on the question, the Court "reaffirm[ed]" that Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 172. *Patterson* also limited the scope of Section 1981's substantive protections, holding that Section 1981 "provides no relief" for discrimination with regard to conduct after a contract has already been formed (*i.e.*, "postformation conduct"), and instead applies only where "an alleged act of discrimination" relates to the "formation" or enforcement of a contract. 491 U.S. at 176-177.

In 1991, Congress amended Section 1981 and effectively "overturned *Patterson*" by expanding the definition of "make and enforce contracts" to include a panoply of postformation conduct. *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004). That amendment redesignated the former provision as subsection (a) and added new subsections (b) and (c). See Civil Rights Act

---

[1] The Court subsequently declined to infer Section 1981 causes of action against the federal government, *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), or against state actors (because they are covered by 42 U.S.C. 1983), *Jett*, 491 U.S. at 735, but in doing so it did not question the continuing validity of an inferred cause of action against private discriminators. See, *e.g.*, *id.* at 731-732.

of 1991 (1991 Act), Pub. L. No. 102-166, § 101, 105 Stat. 1071. Those new provisions read as follows:

> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. 1981(b) and (c).

After the 1991 amendments, there is still no express cause of action in Section 1981, but the Court has continued to recognize that Section 1981 "offers relief" to private plaintiffs when "racial discrimination blocks the creation of a contractual relationship" or "impairs an existing contractual relationship." *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 476 (2006).

2. Respondent began working as an associate manager at one of petitioner's Cracker Barrel restaurants in 1999, and, viewing the record in a light favorable to respondent, his performance was considered generally excellent for more than two years. J.A. 118. In 2001, Steve Cardin began supervising respondent, and frequently made racially derogatory remarks in the workplace. J.A. 118-119. Cardin, the general manager at the restaurant, issued five disciplinary reports against respondent, all of which respondent claimed were groundless and reflections of Cardin's racial animus. J.A. 119. Respondent complained to district manager William

Christensen about Cardin, but Christensen never investigated his complaints. *Ibid.*

A new general manager, Ken Dowd, took over in September 2001. J.A. 119. Shortly thereafter, Joe Stinnett, one of respondent's fellow associate managers, fired Venus Green,[2] a black female food server, purportedly because she failed to show up for a shift (although a white employee had not been fired after failing to appear "on several occasions without notice"). *Ibid.* Respondent complained to Dowd and Christensen that Green's firing was another example of racial discrimination, and he reminded Christensen of his earlier complaints. J.A. 119-120. In December 2001—a week after that complaint and one day before "a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of [respondent's] complaints"—Christensen fired respondent, allegedly because he left a safe unlocked. Respondent both denies that he left the safe unlocked and claims that white associate managers routinely left it unlocked. J.A. 120, 155-157.

3. After filing a timely charge with the Equal Employment Opportunity Commission (EEOC) and receiving a right-to-sue letter, J.A. 36-39, 54-57, 58-59, respondent filed suit in the United States District Court for the Northern District of Illinois, alleging one count of racial discrimination in violation of Section 1981 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and one count of retaliation in violation of Section 1981 and Title VII. J.A. 43-53. The district court dismissed respondent's Title VII claims for procedural deficiencies

---

[2] The district court (J.A. 109) and court of appeals (J.A. 119) refer to "Venis Green," but Ms. Green's first name is spelled "Venus" in the First Amended Complaint (J.A. 48) and the Answer (J.A. 71).

involving his late payment of filing fees, and respondent did not appeal that dismissal. J.A. 82-92.

The district court then granted summary judgment for petitioner on respondent's Section 1981 claims. J.A. 108-116. The district court held that respondent had failed to allege sufficient facts to prove either directly or indirectly that he had suffered retaliation for his complaints of racial discrimination against himself and his co-worker. J.A. 111-115. The district court further held that respondent's discrimination claim failed because it rested on the same allegations. J.A. 115.

4. The court of appeals reversed. J.A. 117-166. By a 2-1 vote, the court rejected petitioner's argument—raised for the first time on appeal—that Section 1981 does not encompass retaliation claims, and reversed the district court's grant of summary judgment in favor of petitioner on the Section 1981 claim.

Analyzing the origins of Section 1981, the court of appeals observed that it and Section 1982 derived from the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, a Reconstruction-era statute recognized as the "first significant civil rights legislation enacted by Congress" pursuant to Section 2 of the Thirteenth Amendment. J.A. 123-126.

The court of appeals observed that in *Sullivan*, this Court permitted a white landowner to bring suit under Section 1982 for retaliation he had suffered for attempting to vindicate the rights of minorities protected by that statute. J.A. 126-127. Moreover, "[f]ollowing *Sullivan*," the courts of appeals had reached a "general consensus" that Section 1981 "broadly prohibited racial discrimination in all contractual facets of the employment relationship, including 'postformation' adverse acts, such as retaliation." J.A. 128. But later, in the wake of this Court's *Patterson* decision, several courts determined

that "retaliation claims" were precluded "because such employer behaviors purportedly involved now-unprotected postformation conduct." J.A. 129-130.

The court of appeals stated that Congress superseded *Patterson* by enacting the Civil Rights Act of 1991. J.A. 133-134. The court noted that the 1991 Act, which added Section 1981(b), "was to be read broadly to include all aspects of the contractual relationship between parties, including the postformation conduct," and that the legislative history of the 1991 Act refers to "retaliation" as an action that would fall within the scope of Section 1981, as amended. J.A. 134-135. The court of appeals concluded that the 1991 Act led several circuits to "reverse course (again) and to allow retaliation claims under section 1981." J.A. 135.

Based on that backdrop, the court of appeals held that Section 1981, as amended by the Civil Rights Act of 1991, "applies to claims of retaliation." J.A. 136-138. The court explained that its reading of Section 1981 is consistent with this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), which relied on *Sullivan*'s holding that Section 1982 prohibits retaliation. J.A. 138-144. The court of appeals stated that, "at least for the purpose of interpreting broad statutory discrimination prohibitions that omit specific retaliation provisions, the Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination." J.A. 141.[3]

---

[3] The court of appeals also concluded that respondent had established a *prima facie* case of retaliation sufficient to survive petitioner's motion for summary judgment. J.A. 149-158. Petitioner, however, does not challenge that aspect of the court of appeals' ruling. See Pet. 2

Chief Judge Easterbrook dissented. J.A. 159-166. In his view, the majority (Judges Williams and Posner) misinterpreted this Court's decisions in *Jackson* and *Sullivan*, and failed to follow an appropriately text-based method of statutory interpretation, exemplified by this Court's recent decision in *Domino's Pizza*.

SUMMARY OF ARGUMENT

The court of appeals correctly held that Section 1981 prohibits retaliation against an individual because that individual has complained about intentional racial discrimination proscribed by Section 1981.

A. That conclusion is compelled by this Court's decisions addressing retaliation claims under broad-based prohibitions against discrimination. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). In *Sullivan*, the Court held that 42 U.S.C. 1982—a companion statute to Section 1981 with similar operative language and common lineage—encompasses retaliation claims. And in *Jackson*, the Court—relying on *Sullivan*—held that the prohibition against sex discrimination in programs receiving federal financial assistance in Title IX of the Education Amendments of 1972, 20 U.S.C. 1618 *et seq.*, encompasses retaliation claims. If—as *Sullivan* and *Jackson* establish—Section 1982 prohibits retaliation, then Section 1981 must do so as well. Considerations of *stare decisis* have their greatest force in the area of statutory interpretation, and petitioner has supplied no basis for this Court to deviate from the statutory holdings of *Sullivan* and *Jackson* in the analogous setting here.

("The sole legal issue presented here [is] whether race retaliation is cognizable under Section 1981."); Pet. Br. 7 (same).

B. Unlike some anti-discrimination statutes, Section 1981 does not expressly mention retaliation or establish an express cause of action for retaliation. But—as this Court has recognized is true for Section 1982 and Title IX—that is unsurprising, since Section 1981 consists of a general prohibition on discrimination, and it lacks any express cause of action against any form of discrimination. Petitioner incorrectly analogizes Section 1981 to more detailed statutes that include express causes of action. The statutory schemes that are materially analogous to Section 1981 are not the ones cited by petitioner, where Congress expressly provided for a cause of action and expressly prohibited retaliation, but rather the much smaller category of anti-discrimination statutes that are so abbreviated that *any* cause of action, for any kind of prohibited activity, must be inferred.

As this Court reaffirmed just two Terms ago in *Jackson*, in that context it makes sense to include an anti-retaliation protection in the cause of action that the Court has inferred, because that establishes a coherent remedial regime and appropriately protects the right to contract from impairment. Indeed, if anything, the recognition of a retaliation remedy in this case follows *a fortiori* from *Jackson* because the text of Section 1981 more naturally encompasses a retaliation remedy. The dissenting Justices in *Jackson* contended not that retaliation was not a form of "discrimination," but that it was not discrimination "on the basis of sex." See 544 U.S. at 185-186 (Thomas, J., dissenting). Section 1981, as amended, prohibits all "impairment" by "discrimination," which quite naturally includes discrimination on account of having complained about discrimination on account of race.

C. Any doubt about whether Section 1981 proscribes retaliation was resolved by the Civil Rights Act of 1991. The pre-1991 argument against construing Section 1981 to protect against retaliation was not based on a narrow reading of the word "discrimination"—that word did not even appear in the pre-1991 text—but rested on the notion that most retaliation was postformation conduct. However, following this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), Congress expanded the meaning of the term "make and enforce contracts" in Section 1981 to include all aspects of the contracting process, including postformation conduct, and that should suffice to make retaliation actionable. Petitioner's argument to the contrary demands such a high level of specificity from Congress that it would upset settled doctrine by refusing to countenance claims of racial harassment and preventing *any* private cause of action from being inferred under Section 1981.

D. Policy considerations likewise support the conclusion that Section 1981 prohibits retaliation. This Court's decisions in *Sullivan* and *Jackson*, as well as courts of appeals decisions interpreting Section 1981, recognize that, absent protection against retaliation, the underlying discrimination prohibited by such statutes could go unremedied. And, because of the inferred nature of the underlying rights of action in *Sullivan* and *Jackson*, the Court determined that it was appropriate for the Court to consider that policy concern in interpreting the cause of action it had inferred. Moreover, when Congress enacted the original version of Section 1981 (the Civil Rights Act of 1866), it possessed substantial evidence that the rights of freedmen could not be protected unless those who would help them were also protected from reprisals.

E. Petitioner's contention that recognizing a cause of action for retaliation under Section 1981 will improperly allow employees to bypass Title VII's procedural mechanisms is unpersuasive and, in any event, foreclosed by this Court's repeated explanations that Title VII and Section 1981 are separate and independent remedies for racial discrimination. In addition, many employers are expressly exempted from Title VII coverage, and Section 1981 applies to all types of contracts—not just the employment relationship. Thus, unless Section 1981 itself prohibits retaliation, many of those who complain about racial discrimination that violates the statute will be left without protection against retaliation.

F. *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), provides no basis to deviate from the statutory interpretation that the Court adopted the year before in *Jackson*. *Domino's Pizza* does not require that a Section 1981 plaintiff be the direct victim of non-retaliatory, status-based discrimination, but only that, as with any claim of discrimination, the plaintiff allege that retaliatory discrimination has impaired *the plaintiff's own* contract rights. In this case, respondent has alleged that his own contract rights were impaired by retaliation, because his employment contract with petitioner was terminated. Unlike *Domino's Pizza*, this case therefore involves a paradigmatic Section 1981 claim. Moreover, such impairment is likely to exist anytime a plaintiff alleges that a defendant has altered the terms, conditions, or privileges of his employment in retaliation for complaining about conduct prohibited by Section 1981.

ARGUMENT

CLAIMS ASSERTING RETALIATION BECAUSE OF COMPLAINTS OF INTENTIONAL RACIAL DISCRIMINATION ARE COGNIZABLE UNDER SECTION 1981

As amended, Section 1981(a) of Title 42 of the United States Code guarantees to every person within the United States "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens." Section 1981(c) further protects that right against "impairment by nongovernmental discrimination." The text, background, and purposes of Section 1981 demonstrate that the court of appeals correctly held that Section 1981 encompasses claims of retaliation against those who complain about conduct that violates that statute.

A. Retaliation Because Of Complaints About Racial Discrimination Impairs Contract Rights In Violation Of Section 1981's General Anti-Discrimination Prohibition

This Court's prior decisions holding that Section 1982 and Title IX encompass claims of retaliation compel the conclusion that the general prohibition of intentional racial discrimination in Section 1981 includes claims of discrimination against those who complain about racial discrimination proscribed by Section 1981. Indeed, given the direct link between Section 1981 and Section 1982, that conclusion is considerably more straightforward than in the *Jackson* case just two Terms ago.

1. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this Court held that 42 U.S.C. 1982—the companion statute to Section 1981—encompasses claims arising from retaliation against those who complain of racial discrimination. Sullivan, a white man, rented a

house to a black man and assigned him a membership share that permitted him to use a private park. The corporation that owned the park refused to approve the assignment because the lessee was black. When Sullivan protested that action, the corporation expelled him and took his membership shares. Sullivan sued the corporation under Section 1982, which provided (and continues to provide) that "[a]ll citizens of the United States shall have the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Court held that Sullivan could maintain an action under Section 1982 not only for having been denied the right to complete his transaction with a black person, but also for his "expulsion for the advocacy of [the black person's] cause." 396 U.S. at 237. The Court reasoned that, "[i]f that sanction [of retaliatory expulsion] * * * can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.* Thus, in *Sullivan*, this Court construed Section 1982's general prohibition on racial discrimination in the sale or rental of property to cover retaliation against persons who complain about such discrimination.

Similarly, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), this Court held that another broad-based prohibition against discrimination protects from retaliation those who complain about the kind of discrimination the statute prohibits. Title IX of the Education Amendments of 1972 provides in relevant part that "[n]o person in the United States shall, on the basis of sex, * * * be subjected to discrimination under any education program or activity receiving Federal finan-

cial assistance." 20 U.S.C. 1681(a). Jackson was the male coach of a high-school-girls' basketball team who complained about sex discrimination in the school's athletic program and was then relieved of his coaching position. He sued the respondent board of education under Title IX, alleging that it had retaliated against him for his complaints about discrimination. 544 U.S. at 171-172.

This Court held that Title IX's prohibition of "discrimination" "on the basis of sex" includes a ban on retaliation against those who complain of sex discrimination. As the Court explained:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is by definition an intentional act. * * * Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Jackson, 544 U.S. at 173-174.

In reaching that interpretation of Title IX, *Jackson* affirmatively relied on *Sullivan*, which it characterized as "interpret[ing] a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." 544 U.S. at 176. The *Jackson* Court reasoned that "[r]etaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the

basis of sex,' just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." *Id.* at 176-177.[4]

Because the operative language in Section 1982—*i.e.*, "shall have the same right * * * as is enjoyed by white citizens"—is identical to that in Section 1981(a), *Sullivan* and *Jackson* compel the conclusion that Section 1981 encompasses retaliation claims as well.

2. "This Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality opinion)). In addition, the Court has explained that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress

---

[4] Repeating a point made in the dissent in the court of appeals (J.A. 159), petitioner contends that *Jackson* is inapposite because it relied upon ambiguity in the word "discrimination," which supposedly does not appear in Section 1981. Pet. Br. 38. But, as amended in 1991, Section 1981 makes express that it proscribes "discrimination." See 42 U.S.C. 1981(c) (protecting rights "against impairment by nongovernmental discrimination"). Moreover, Section 1981 has uniformly been interpreted as a prohibition on racial "discrimination" in the making and enforcement of contracts. See, *e.g.*, *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 474 (2006); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 455, 459-460 (1975). Finally, the real debate in *Jackson* was not over the meaning of the word "discrimination," but the phrase "on the basis of sex" and whether that phrase precluded relief for someone subject to discrimination because he complained about discrimination on the basis of sex. Here, Section 1981, as amended, forbids all impairment and all discrimination, which naturally includes discrimination on the basis of complaining about racial discrimination. See p. 17, *infra*.

remains free to alter what we have done" (as Congress's reaction to *Patterson* itself illustrates). *Id.* at 172-173. Petitioner has provided no basis—much less a compelling basis—for the Court to deviate from the path of statutory construction paved by *Sullivan* and *Jackson* in this case.

Indeed, far from presenting any basis to disregard the statutory constructions in *Sullivan* and *Jackson*, this case presents a more compelling situation for reading the general prohibition at issue to encompass retaliation claims. A retaliation cause of action fits more comfortably within the plain text of Section 1981 than it does within that of Section 1982 or Title IX, because Section 1981 applies whenever contract rights are "impair[ed] by * * * discrimination." 42 U.S.C. 1981(c). The reference to "impairment" connotes a less direct relationship between the discrimination and the effect on the underlying contract rights. Moreover, the primary textual difficulty the Court confronted in *Jackson*—the limitation of the prohibition on discrimination to discrimination "on the basis of sex"—is absent. Unlike Title IX, there is no requirement in Section 1981 that the prohibited discrimination be "on the basis of" status but only that the discrimination impair rights under Section 1981, which vitiates the primary textual concern of the *Jackson* dissent. See 544 U.S. at 185-186 (Thomas, J., dissenting).

Furthermore, because of the direct link between Section 1981 and Section 1982, the conclusion that Section 1981 encompasses retaliation claims follows *a fortiori* from this Court's decision in *Jackson*, which reaffirmed and extended to Title IX *Sullivan*'s holding that Section 1982 encompasses retaliation claims. In addition to their common terms, Sections 1981 and 1982 have a com-

mon origin (the Civil Rights Act of 1866) and common purposes. See, *e.g.*, *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982); *Runyon* v. *McCrary*, 427 U.S. 160, 168 & n.8 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968). Thus, as a result of the close, "historical interrelationship between" Sections 1981 and 1982, this Court has generally found "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

For example, in *Runyon*, the Court held that Section 1981 applies to private discrimination, in part because the case was "directly analogous to * * * *Sullivan*." 427 U.S. at 173 n.10. As Justice Powell observed, the holding of *Sullivan* "necessarily appl[ies]" to Section 1981 in light of the two statutes' "common derivation." *Id.* at 187 (Powell, J., concurring); see *id.* at 190 (Stevens, J., concurring) ("Although I recognize the force of MR. JUSTICE WHITE's argument that the construction of § 1982 does not control § 1981, it would be most incongruous to give those two sections a fundamentally different construction."). See also *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 617-618 (1987) (applying to Section 1982, without further analysis, the Section 1981 discussion and holding of *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 609-613 (1987)).

Given the common origin of Section 1981 and Section 1982, and this Court's decisions in *Sullivan* and *Jackson*, the Court could not interpret Section 1981 to lack a retaliation provision without creating an enormous incongruity in the case law in this area, if not effectively overruling the Court's prior cases. And even petitioner has not asked this Court to take the dramatic step of overruling its prior precedent, much less elaborated on

the relevant considerations. Cf. *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring in part and concurring in the judgment).

B. The Absence Of A Reference To Retaliation Is Not Dispositive In The Context Of A General Prohibition On Discrimination That Lacks An Express Cause Of Action

Petitioner's call for a plain-language reading of Section 1981 is premised almost exclusively on the point that, unlike most other federal anti-discrimination statutes, Section 1981 includes neither the word "retaliation" nor a separate provision addressing retaliation. See Br. 12, 14-18. But that line of argument is foreclosed by this Court's decision in *Jackson*.

The school board in *Jackson* contrasted Title IX (which does not address retaliation) with Title VII (which contains a distinct anti-retaliation provision, 42 U.S.C. 2000e-3(a)). The Court explained that Title VII is "a vastly different statute from Title IX," because:

> Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. * * * By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute. * * * Because Congress did not list *any* specific discriminatory practice when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.

544 U.S. at 175. The Court also stressed that Title IX, unlike Title VII, provides no express cause of action. See 544 U.S. at 175 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-284 (1998)). In *Gebser*, the Court had stated that, when a right of action has been

inferred by the courts, it has "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." 524 U.S. at 284.

Like Title IX, Section 1981 is a "broadly written general prohibition" against discrimination in which "Congress did not list *any* discriminatory practice." Accordingly, under the reasoning of *Jackson*, the presence of explicit anti-retaliation provisions in other, dissimilar statutes does not answer whether Congress intended Section 1981 to prohibit retaliation. Moreover, as in Title IX, all causes of action under Section 1981 have been inferred by the courts. See pp. 3-5, *supra*. Thus, in elaborating on the resulting causes of action the Court has assumed a greater latitude to make them workable and sensible—a function distinct from the one that the Court exercises in construing and giving effect to express causes of action with more reticulated remedial schemes.[5]

In that regard, the statutory schemes that are materially analogous to Section 1981 are not the ones cited by petitioner—each of which includes an express right of

---

[5] A general nondiscrimination provision does not invariably encompass a prohibition on retaliation. Other indications from text and context can show that claims for retaliation are excluded, as, for instance, in the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a, that is at issue in *Gomez-Perez* v. *Potter*, cert. granted, No. 06-1321 (oral argument scheduled for Feb. 19, 2008). In the ADEA, there is no need to infer a right of action for federal employees in the anti-discrimination context, and there are obvious differences between the private-sector regime (which includes both anti-discrimination and anti-retaliation provisions), the provision making the private-sector regime applicable to states, and the federal-sector provision. See Gov't Br. at 14-27, *Gomez-Perez*, *supra* (No. 06-1321). Moreover, federal employees generally have means of securing relief for retaliation independent of the ADEA. See *id.* at 27-37.

civil action or an administrative enforcement mechanism to vindicate its principal anti-discrimination provision (Pet. Br. 17-18)[6]—but rather the much smaller category of anti-discrimination statutes—notably, Section 1982 and Title IX—that contain only general prohibitions that have already been interpreted by this Court to embody inferred causes of action against discrimination.

C. The Statutory History Confirms That Section 1981 Encompasses Retaliation Claims

Before this Court's decision in *Patterson*, the courts of appeals had no difficulty concluding—on the basis of *Sullivan* and the common language and history of Sections 1981 and 1982—that Section 1981 encompassed retaliation claims.[7] Congress is presumed to be aware of that backdrop and when Congress enacted the Civil Rights Act of 1991 in order (in pertinent part) to restore the pre-*Patterson* law recognizing that Section 1981 applied to postformation conduct, Members of Congress

---

[6] See 29 U.S.C. 160(b) (provision of National Labor Relations Act authorizing claims of unfair labor practices before the National Labor Relations Board); 29 U.S.C. 216(b) (authorizing civil actions under Fair Labor Standards Act of 1938); 29 U.S.C. 626(c) (authorizing civil actions under the ADEA); 29 U.S.C. 2617(a) (authorizing civil actions under Family and Medical Leave Act of 1993); 38 U.S.C. 4323(a) (authorizing civil actions under Uniformed Services Employment and Reemployment Act of 1994); 42 U.S.C. 2000e-5(f) (authorizing civil actions under Title VII); 42 U.S.C. 12117, 12133, 12188, 12203 (authorizing civil actions under Americans with Disabilities Act of 1990); 49 U.S.C. 31105(b) and (c) (authorizing administrative complaints and judicial review under Surface Transportation Assistance Act of 1982).

[7] See, *e.g.*, *Choudhury* v. *Polytechnic Inst.*, 735 F.2d 38, 42-43 (2d Cir. 1984); *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 598-599 (5th Cir. 1982), overruled by *Carter* v. *South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977); *London* v. *Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981).

had every reason to believe that they were reinstating that result (on a prospective basis). The pertinent provisions of the 1991 Act bolster that conclusion. In adding subsection (b) to Section 1981, Congress evinced an intent to apply Section 1981's prohibition against racial discrimination to all aspects of the contractual relationship—including the postformation conduct that *Patterson* had excluded from the scope of Section 1981.[8]

Petitioner claims (Br. 19) that Congress knew by 1991 that "the judiciary would analyze Section 1981 based on its text," and thus, "if Congress intended Section 1981 to provide for a cause of action based on retaliation, it would have provided [one] in the statutory text." But while Congress would surely have been aware that "text matters" in enacting the 1991 amendments, it clearly did not write on a blank slate or ignore the preexisting judicial constructions of Sections 1981 and 1982. Tellingly, Congress, in amending Section 1981, did not rewrite it to create an express cause of action.[9] Rather, Congress took this Court's decisions recognizing an inferred cause of action as a given. In the same way, Congress legislated against the backdrop of *Sullivan* and

---

[8] As added by the 1991 Act, 42 U.S.C. 1981(b) provides:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, and conditions of the contractual relationship.

[9] The 1991 Act added Section 1981(c), which codified this Court's previous holdings that Section 1981 covers discrimination by private parties, see, *e.g.*, *Johnson*, 421 U.S. at 460, but Congress did not create an express cause of action for any discrimination cases. Nevertheless, this Court has continued to infer an anti-discrimination cause of action from Section 1981. See, *e.g.*, *Domino's Pizza*, 546 U.S. at 476 (recognizing that Section 1981 "offers relief").

the direct connection between Section 1981 and Section 1982. There is certainly no indication in the 1991 Act that Congress intended a different construction of Section 1981 than the one that this Court adopted for Section 1982 in *Sullivan*.

To the contrary, it is clear that what Congress intended to address, *inter alia*, was the *Patterson* decision and the limitation of Section 1981 to postformation conduct. Indeed, this Court has acknowledged that the 1991 Act "overturned *Patterson*." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004). But under petitioner's strained reasoning, Congress would not have accomplished its objective because it failed to include the term "harassment" in subsection (b), and has thus made harassment no more actionable than retaliation. In reality, Congress responded to *Patterson* in a way that makes clear that both harassment and retaliation are prohibited—*viz.*, by covering postformation conduct. After all, the argument that retaliation would not be prohibited by the pre-1991 statute would not be based on its limitation to "discrimination" or "discrimination on the basis of race"; those terms did not even appear in the statute. Rather the argument would be that most retaliation would be postformation conduct. Congress unambiguously and textually eliminated that argument, and thus there is no reason to think that retaliation—uniquely among postformation conduct impairing Section 1981 rights—is not prohibited.

The legislative history of the 1991 Act bears this out. The House Report stated:

> The Committee intends this provision to bar all race discrimination in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employ-

> ment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring.

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1 at 92 (1991) (emphasis added). The report also stated that subsection (b) was intended to respond to several court of appeals decisions that, after *Patterson*, had held that Section 1981 does not encompass claims of retaliation. *Id.* at 92-93 n.92.[10] The report's principal discussion of minority views did not dispute the majority's characterization of that effect or its desirability. See *id.* at 141 ("While *Patterson* is clearly defensible as a matter of strict statutory construction, we agree * * * that the case creates an illogical situation under which" Section 1981 would not include "claims for harassment, wrongful discharge, and many other employment situations."). Congress had heard evidence that *Patterson* was resulting in the dismissal of "racial harassment" and "retaliation" claims. See *Civil Rights Act of 1990, Hearing Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 966, 976-983 (1990) (statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Education Fund, Inc.).

In light of this legislative record, it is not surprising that, in the wake of the 1991 Act, the courts of appeals have again reached a broad consensus that Section 1981

---

[10] As noted, the reasoning of those cases was based on the argument that retaliation occurred postformation, a concern that the 1991 amendments addressed directly and textually.

encompasses claims of retaliation against those who complain of racial discrimination.[11]

D. Policy Reasons Recognized In *Jackson* Support The Conclusion That Section 1981 Prohibits Retaliation Against Those Who Complain About Intentional Racial Discrimination Against Themselves Or Others

This Court's decisions in *Jackson* and *Sullivan* were motivated in part by policy concerns about the lack of a retaliation remedy under those statutes. In *Jackson*, the Court stated that, unless retaliation were barred, "individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result." 544 U.S. at 180. It also characterized *Sullivan* as recognizing that "the underlying discrimination is perpetuated" when there is no "protection against retaliation." *Id.* at 180.

Providing protections for a supervisor or colleague who speaks up for a co-worker he believes to be a victim of racial discrimination is consistent not only with the rationale of the claims that the Court recognized in *Sullivan* and *Jackson*, but also with the recognition underlying Section 1981's original incarnation that protect-

---

[11] See, *e.g.*, *Moore* v. *Consolidated Edison Co.*, 409 F.3d 506, 508 n.2 (2d Cir. 2005); *Aleman* v. *Chugach Support Servs., Inc.*, 485 F.3d 206, 213-214 (4th Cir. 2007); *Foley* v. *University of Houston Sys.*, 355 F.3d 333, 338-339 (5th Cir. 2003); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 575-576 (6th Cir.), cert. denied, 531 U.S. 1052 (2000); J.A. 136-149 (7th Cir. 2007); *Manatt* v. *Bank of Am., NA*, 339 F.3d 792, 800-801 & n.11 (9th Cir. 2003); *Andrews* v. *Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-1413 (11th Cir. 1998).

ing the rights of former slaves would require protections for those allied with them.[12]

As this Court has previously explained at length, the Civil Rights Act of 1866 was intended to protect the "civil rights of whites as well as nonwhites." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 289 (1976); see *id.* at 287-295. That protection is consistent with the fact that the supporters of slavery had long punished whites and nonwhites who spoke out on behalf of slaves and freedmen in an attempt to discourage such support. See Akhil Reed Amar, *America's Constitution: A Biography* 371-372 (2005); William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* 76 (1995). Even after the Civil War, brutal reprisals continued not just against freedmen but also against those who would assist them. While Congress was considering the Civil Rights Act of 1866 (which contained what later became Section 1981's operative language):

> the senators and representatives had before them a sizeable body of data bearing on the treatment of the Negro, *the loyal white and the northerner* in the South by private individuals and unofficial groups. * * * Accounts in newspapers[,] * * * official documents, private reports and correspondence were all adduced to show that murder, shootings, whippings, robbing, and brutal treatment of every kind were daily inflicted on freedmen *and their white friends.*

Jacobus tenBroek, *Equal Under Law* 181 (rev. ed. 1965) (emphases added; internal quotation marks omitted);

---

[12] In this case, respondent alleges that he was terminated by petitioner because he complained about racially discriminatory treatment of both himself and Venus Green. See J.A. 109, 112.

see also Robert J. Kaczorowksi, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 877 (1986) ("[W]hile Reconstruction civil rights enactments were intended primarily for the protection of blacks, they were also intended to protect whites.").

Recognizing that Section 1981 encompasses a retaliation right therefore not only accords with the policy considerations identified in *Jackson*, but comports with the purpose and history of Section 1981 itself.

E. Section 1981's Partial Overlap With Title VII Does Not Preclude Retaliation Claims Here

Petitioner and its amici contend that recognizing a cause of action for retaliation under Section 1981 would be inconsistent with Title VII, which itself authorizes retaliation claims in the employment context. See Pet. Br. 21-26; Chamber of Commerce Amicus Br. 20-24; Equal Employment Advisory Council Amicus Br. 16-18. Notwithstanding the general principle that a specific remedial scheme may trump a more general one, it is well established that potential causes of action under Section 1981 co-exist with those under Title VII, because "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

1. As an initial matter, Title VII and Section 1981 are not co-extensive. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Section 1981 applies broadly to all types of contracts, not just those for employment. Thus, unless Section 1981 itself prohibits retaliation, Title VII cannot ensure a federal remedy for all who are retaliated against for complaining about pri-

vate discrimination that could violate Section 1981. Moreover, even in the employment context, many employers are exempted from Title VII: for example, those with fewer than 15 employees, certain governmental entities, and certain bona fide private membership clubs. See 42 U.S.C. 2000e(b).

In light of the incomplete overlap between the two statutes, it is impossible to tell where petitioner's reasoning would sacrifice potential Section 1981 claims for the sake of Title VII's limits (*e.g.*, in all employment-discrimination cases, or only those that could be covered by Title VII, or only those where the plaintiff fails to meet Title VII's procedural requirements). In fact, petitioner admits that "it could be argued that Section 1981 should not apply in the employment context" at all. Pet. Br. 21 n.2. That broader proposition is wholly inconsistent with precedents of this Court and the text of the 1991 amendments, and thus petitioner draws the line at retaliation claims "for purposes of this brief," *ibid.*, but gives no principled reason for that stopping point.

2. In any event, this Court has already recognized that Title VII's procedural requirements do not alter the applicability of Section 1981. In *Johnson*, the Court held that the timely filing of a Title VII employment-discrimination charge with EEOC does not toll the running of the limitations period applicable to a Section 1981 action based on the same facts. After summarizing the similarities and differences between Title VII and Section 1981 (421 U.S. at 457-460), the Court concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461; see also *Runyon*, 427 U.S. at 174 & n.11 (recognizing that Congress did not intend Title VII to

limit Section 1981's applicability to employment discrimination); *General Bldg. Contractors Ass'n*, 458 U.S. at 380 n.4 (noting petitioners were sued under Section 1981 rather than Title VII because they were not named in the EEOC charge). Although *Patterson* invoked the scope of Title VII to support its narrow reading of Section 1981, it also recognized that "there is some necessary overlap" between the two statutes. 491 U.S. at 181.

At least two aspects of the Civil Rights Act of 1991 underscore that Congress intended that, when applicable, Section 1981 would continue to provide remedies independent of Title VII. First, Congress responded to *Patterson*'s attempt to minimize overlap between the statutes by adopting the expanded definition of "make and enforce contracts" that now appears in Section 1981(b). Second, it underscored the overlap and lack of exclusivity of the two statutes by authorizing damages awards under Title VII, 42 U.S.C. 1981a(a)(1), and simultaneously specifying that the new Title VII remedy should not "be construed to limit the scope of, or the relief available under, [S]ection 1981." 42 U.S.C. 1981a(b)(4).

Petitioner stresses (Br. 23) that the Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), described the importance of short deadlines within the framework of Title VII. But *Ledbetter* also acknowledged that similar discrimination claims might be vindicated under different statutory schemes with fewer procedural requirements. Thus, the Court explained that "the Title VII obstacles" it enforced would not apply to a claim under the Equal Pay Act of 1963, 29 U.S.C. 206(d) (which the petitioner in that case had "elected to abandon"). *Ledbetter*, 127 S. Ct. at 2176 & n.9. The same result follows here, especially in light of

the Court's repeated recognition of Section 1981's continuing vitality alongside Title VII.

3. As an empirical matter, there is no evidence that retaliation claims under Section 1981 will disrupt Title VII. Petitioner (Br. 39) notes the increasing proportion of Title VII charges that include claims of retaliation. See also Chamber of Commerce Amicus Br. 23. But that trend has occurred in the presence of a general consensus that Section 1981 already encompasses retaliation claims. See note 11, *supra*. In this case, the Section 1981 retaliation claim did not deprive petitioner of an opportunity for EEOC-assisted conciliation or any of the other important benefits associated with Title VII, because respondent filed a charge with EEOC and waited for a right-to-sue letter before filing his lawsuit.

Petitioner also claims (Br. 40) that allowing Section 1981 retaliation claims that could not be brought under Title VII will create a legal regime that gives *racial* discrimination a special status compared to other discrimination claims. But this Court's decisions in *Jackson* and *Ledbetter* recognized that certain victims of sex discrimination have remedies under Title IX and the Equal Pay Act that are unavailable to others protected by Title VII. That inevitable result of differently worded but sometimes overlapping anti-discrimination statutes did not justify disregarding the intent of Congress and this Court's decisions in those cases, and there is no reason for doing so here.

In any event, there is nothing problematic about special protections against racial discrimination—especially in light of Section 1981's roots in the Thirteenth Amendment, which "authorized Congress to enact legislation abolishing the 'badges and incidents of slavery.'" *General Bldg. Contractors Ass'n*, 458 U.S. at 390 n.17 (quot-

ing *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). Other constitutional and statutory anti-discrimination provisions are not diminished by the acknowledgement that "[t]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension" that must be "eradicat[ed]." *Patterson*, 491 U.S. at 174, 188.

F. This Court's Decision in *Domino's Pizza* Does Not Preclude Retaliation Claims Under Section 1981

In *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), this Court held that a plaintiff cannot state a Section 1981 claim unless he has an existing (or proposed) contract that he wishes to make or enforce. *Id.* at 479-480. That relatively unremarkable conclusion by a unanimous Court did not, as petitioner suggests, create a sea change in Section 1981 law or in any way cast doubt on the result (or reasoning) of *Jackson* and *Sullivan*, which were not mentioned in *Domino's Pizza*.

Consistent with the holding of *Domino's Pizza*, however, a Section 1981 plaintiff alleging retaliation must allege that retaliatory discrimination has impaired *the plaintiff's own* contract. At a minimum, a plaintiff may satisfy that requirement by alleging retaliatory conduct that affects the "benefits, privileges, terms, and conditions" of her employment relationship. 42 U.S.C. 1981(b). That ensures that there will be no attempt to make Section 1981 "an omnibus remedy for *all* racial injustice." 546 U.S. at 479. It is also consistent with *Sullivan* and *Tillman*, which allowed white plaintiffs to pursue claims for injury to their own property or contract rights that resulted from retaliation. See *Sullivan*, 396 U.S. at 237; *Tillman*, 410 U.S. at 434, 440.

In this case, there is no question that respondent has alleged that his own contract rights were impaired by petitioner's retaliation: His employment contract was terminated. Accordingly, allowing him to assert a retaliation claim under Section 1981 is perfectly consistent with the rationale and holding of *Domino's Pizza*.[13]

---

[13] Because the alleged retaliation directly impaired the contractual relationship, this case provides no occasion to consider whether, or to what extent, the retaliation right embodied in Section 1981 is narrower or broader than the one this Court recognized under Title VII in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In that case, the Court held that the express anti-retaliation provision in Section 704(a) of Title VII, 29 U.S.C. 2000e-3(a), "extends beyond workplace-related or employment-related retaliatory acts and harm." 126 S. Ct. at 2414. It based that conclusion on textual differences between Title VII's "substantive anti-discrimination provision" (which is limited to employment-related discrimination), and its anti-retaliation provision (which contains "[n]o such limiting words"). 126 S. Ct. at 2411-2412. Section 1981 does not contain such interrelated textual provisions and, as discussed above, in *Jackson* this Court indicated that the Court has more leeway in interpreting and giving effect to an inferred right of action against retaliation under a broad anti-discrimination provision like Title IX—and Section 1981.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GRACE CHUNG BECKER
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

DENNIS J. DIMSEY
LISA WILSON EDWARDS
Attorneys

JANUARY 2008

74 55295 B

(7)

34pgs No. 06-1431

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CATHERINE E. STETSON *
JONATHAN T. REES
AMY FOLSOM KETT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SECTION 1981'S PROHIBITION ON RACIAL DISCRIMINATION IN CONTRACTUAL RELATIONSHIPS DOES NOT CREATE A CAUSE OF ACTION FOR RETALIATION 5

II. *JACKSON* AND *SULLIVAN* DO NOT SUPPORT A DIFFERENT CONCLUSION 12

III. ENGRAFTING A RETALIATION PROHIBITION ONTO SECTION 1981 WOULD UNNECESSARILY UNDERMINE TITLE VII'S CONCILIATION PROCESS 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 23

Alexander v. *Sandoval*, 532 U.S. 275 (2001) ..... *passim*

Barrows v. *Jackson*, 346 U.S. 249 (1953) 15

Burlington Northern & Santa Fe Ry. v. *White*, 126 S. Ct. 2405 (2006) ..... *passim*

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 18

Cort v. *Ash*, 422 U.S. 66 (1975) 17

Dana Tank Container, Inc. v. *Human Rights Comm'n*, 687 N.E.2d 102 (Ill. App. Ct. 1997) 15

Delaware State College v. *Ricks*, 449 U.S. 250 (1980) 22

Domino's Pizza, Inc. v. *McDonald*, 546 U.S 470 (2006) ..... *passim*

EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981) 23

EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 23

TABLE OF AUTHORITIES—Continued

Page

Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, 545 U.S. 546 (2005) 11

Federal Express Corp. v. *Holowecki*, 127 S. Ct. 2914 (2007) (No. 06-1322) 2

General Bldg. Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375 (1982) 5, 12

Georgia v. *Rachel*, 384 U.S. 780 (1966) 5

Gomez-Pérez v. *Potter*, 476 F.3d 54 (1st Cir. 2007), *cert. granted*, __ S. Ct. __, 2007 WL 989594 (U.S. Sept. 25, 2007) (No. 06-1321) 10

J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 17

Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) ..... *passim*

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 20

Jones v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) 21, 22

Kolstad v. *American Dental Ass'n*, 527 U.S. 526 (1999) 2

Ledbetter v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) 2, 22

TABLE OF AUTHORITIES—Continued

Page

Lytle v. *Household Mfg., Inc.*, 494 U.S. 545 (1990) 11

McDonald v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) 7

Mohasco v. *Silver*, 447 U.S. 807 (1980) 22

National R.R. Passenger Corp. v. *Morgan*, 536 U.S. 101 (2002) 22

Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 23

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) ..... *passim*

Rivers v. *Roadway Express, Inc.*, 511 U.S. 298 (1994) ..... *passim*

Rodriguez v. *United States*, 480 U.S. 522 (1987) 16

Russello v. *United States*, 464 U.S. 16 (1983) 10

Shannon v. *United States*, 512 U.S. 573 (1994) 11

Singleton v. *Wulff*, 428 U.S. 106 (1976) 14

Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 3, 15, 16

United States v. *Gonzales*, 520 U.S. 1 (1997) 10

TABLE OF AUTHORITIES—Continued

Page

Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 17

W.R. Grace & Co. v. *Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983) 23

Walters v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997) 2

Williams v. *Federal Nat'l Mortgage Ass'n*, 2006 WL 1774252 (D.D.C. June 26, 2006) 14

Federal Statutes:

2 U.S.C. § 1317(a) 10

20 U.S.C. § 1681(a) 12

28 U.S.C. § 1658(a) 21

29 U.S.C. § 623(d) 6

29 U.S.C. § 2615 6

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1981(a) ..... *passim*

42 U.S.C. § 1981(b) 3, 5, 8

42 U.S.C. § 1982 ..... 4, 15

42 U.S.C. § 2000d 16

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 2000e(b) 14

42 U.S.C. § 2000e-2(a)(1) 7, 9

42 U.S.C. § 2000e-2(a)(2) 7

42 U.S.C. § 2000e-3(a) 6, 7, 14

42 U.S.C. § 2000e-5(b) 4, 24

42 U.S.C. § 2000e-5(e)(1) 4, 21

42 U.S.C. § 2000e-5(f)(1) 4, 21

42 U.S.C. §§ 3601-3631 16

42 U.S.C. § 12203(a) 6

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, § 3(4) 11

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. I, § 101(1) 9

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. I, § 101(2) 8

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. III, § 302 9

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. III, § 312 10

TABLE OF AUTHORITIES—Continued

Page

State Statutes:

ALASKA STAT. § 18.80.300(5) 14

CAL. GOV'T CODE § 12926(d) 14

CONN. GEN. STAT. ANN. § 46a-51 14

D.C. CODE § 2-1401.02(10) 14

D.C. CODE § 2-1402.61(a) 15

DEL. CODE ANN. tit. 19, § 710(6) 14

HAW. REV. STAT. ANN. § 378-1 14

IDAHO CODE ANN. § 67-5902(6) 14

IDAHO CODE ANN. § 67-5911 15

775 ILL. COMP. STAT. ANN. 5/6-101(A) 15

IOWA CODE ANN. § 216.11.2 15

KAN. STAT. ANN. § 44-1002(b) 14

MASS. GEN. LAWS ANN. CH. 151B, § 4(4) 15

ME. REV. STAT. ANN. tit. 5, § 4553.4 14

MICH. COMP. LAWS ANN. § 37.2201(a) 14

MINN. STAT. ANN. § 363A.03(16) 14

MONT. CODE ANN. § 49-2-101(11) 14

MONT. CODE ANN. § 49-2-301 15

TABLE OF AUTHORITIES—Continued

Page

N.H. REV. STAT. ANN. § 354-A:19 15

N.M. STAT. ANN. § 28-1-2(B) 14

N.M. STAT. ANN. § 28-1-7(I)(2) 15

N.Y. EXEC. LAW § 292(5) 15

N.D. CENT. CODE § 14-02.4-02(8) 14

N.D. CENT. CODE § 14-02.4-18 15

OHIO REV. CODE ANN. § 4112.01(A)(2) 15

OHIO REV. CODE ANN. § 4112.02(I) 15

WIS. STAT. ANN. § 111.32(6)(a) 14

Regulation:

29 C.F.R. § 1602.14 22

Rule:

S. Ct. Rule 37.6 2

Other Authorities:

Brief for Respondent, *Domino's Pizza, Inc.* v. *McDonald*, 547 U.S. 470 (2006) (No. 04-593), 2005 WL 2367598 19

EEOC Charge Statistics, http://www.eeoc.gov/stats/enforcement.html 23

IN THE

Supreme Court of the United States

No. 06-1431

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber")[1] is the world's largest business

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and

federation. It represents an underlying membership of more than three million businesses and organizations in every industrial sector and geographic region of the country.

The Chamber has participated as *amicus curiae* in many cases before this Court, including cases relating to the federal anti-discrimination laws. *See, e.g.*, *Federal Express Corp.* v. *Holowecki*, 127 S. Ct. 2914 (2007) (No. 06-1322) (granting certiorari); *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S 470 (2006); *Burlington Northern & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405 (2006); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997).

SUMMARY OF ARGUMENT

Like other federal statutes that combat discrimination, Section 1981, 42 U.S.C. § 1981, prohibits injury to individuals based on their "status," or membership in a protected group. *Burlington Northern*, 126 S. Ct. at 2412. As originally enacted in 1866, Section 1981 guaranteed each person the same right "as is enjoyed by white citizens" to "make and enforce contracts" – that is, to enter into contractual relationships and sue to enforce them. 42 U.S.C. § 1981(a). *See also Patterson* v. *McLean Credit Union*, 491 U.S. 164, 176-178 (1989). The Civil Rights Act of 1991 expanded the meaning of "make and enforce con-

---

its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

tracts" to include all aspects of the contractual relationship through termination, but it did not proscribe anything other than racially motivated interference with contractual rights. 42 U.S.C. § 1981(b).

Unlike numerous other federal anti-discrimination laws, Section 1981 does not expressly prohibit retaliation against individuals who complain about alleged violations of the statute. As the Court recently emphasized in *Burlington Northern*, anti-retaliation provisions proscribe injury based on an individual's "conduct," regardless of his or her membership in a protected class. 126 S. Ct. at 2412. By its terms Section 1981 prohibits only discrimination based on an individual's racial status, not on his or her conduct, and therefore does not prohibit retaliation.

Nor is a retaliation bar implied in the statute. Anti-retaliation rules did not even become the norm until long after Section 1981's enactment. And the ubiquity of such provisions by 1991 establishes *not* that the 1991 amendment added a retaliation proscription to Section 1981 *sub silentio*, but rather that, had Congress intended to proscribe retaliation, it would have done so expressly. A prohibition on retaliation also is unnecessary to effectuate Section 1981's anti-discrimination rule, because employees – who constitute the vast majority of Section 1981 claimants – are already protected from retaliation under Title VII and state law.

The Court's holdings in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), do not support a different conclusion. *Jackson* found

a retaliation prohibition implicit in the particular language of Title IX, but it explicitly *distinguished* statutes that – like Section 1981 – prohibit discrimination based on the individual victim's membership in a protected class. And *Sullivan*, for its part, recognized a cause of action for retaliation under 42 U.S.C. § 1982 on the ground that third parties are often needed to vindicate the property rights protected by the statute – a consideration not relevant to Section 1981. This Court also long ago abandoned *Sullivan*'s overly accommodating interpretive approach of supplementing a statute to effectuate its purpose even absent any valid corresponding evidence of statutory intent. *See, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

Reading a retaliation prohibition into Section 1981 not only is incompatible with the statute's text and purpose, but it also will have significant adverse consequences for employers and employees alike. The new cause of action recognized by the Seventh Circuit permits plaintiffs who allege retaliation for reporting race discrimination – but not sex discrimination or discrimination based on any other protected characteristic – to file lawsuits outside the limitations period that Congress determined in Title VII is appropriate for all such retaliation claims, and without complying with Title VII's comprehensive conciliation process. *See* 42 U.S.C. §§ 2000e-5(b), (e)(1), (f)(1).

Allowing such suits will frustrate Congress's objective in Title VII of ensuring that retaliation claims are brought before memories fade, witnesses disappear, and personnel documents are discarded in the

regular course of business. And allowing such suits will frustrate Title VII's laudable statutory goal of promptly notifying employers of claims against them so that they can attempt to conciliate. and salvage ongoing employment relationships, before formal litigation – with all of its attendant burdens on both sides – commences.

ARGUMENT

I. SECTION 1981'S PROHIBITION ON RACIAL DISCRIMINATION IN CONTRACTUAL RELATIONSHIPS DOES NOT CREATE A CAUSE OF ACTION FOR RETALIATION.

Section 1981 "protects the equal right of '[a]ll persons within the jurisdiction of the United States' to 'make and enforce contracts' without respect to race." *Domino's*, 546 U.S at 474-475 (quoting 42 U.S.C. § 1981(a)). "[M]ake and enforce contracts" is now defined to "include[ ] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

This Court has long recognized that Section 1981 "protects a limited category of rights." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982) (quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)). In service of the statute's limited reach, this Court has repeatedly rejected efforts to apply Section 1981 beyond the specific purposes clearly identified in its text. *See, e.g., Domino's*, 546 U.S at 479-480 (rejecting Section 1981 claim by plaintiff lacking rights under the relevant contract); *Rivers* v. *Road-*

way Express, Inc., 511 U.S. 298, 307 (1994) (finding no "clear expression of congressional intent" to apply 1991 amendment to Section 1981 retroactively). The Seventh Circuit's holding that Section 1981 creates a cause of action not only for race discrimination in "mak[ing] and enforc[ing] contracts," but also separately for retaliation against individuals who complain about such discrimination, represents just such an impermissible expansion of Section 1981's scope. The decision should be reversed.

1. Section 1981 does not contain a separate provision prohibiting retaliation. This alone renders the statute unlike numerous other federal anti-discrimination laws, including Title VII, 42 U.S.C. § 2000e-3(a); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); the Family and Medical Leave Act, 29 U.S.C. § 2615; and the Americans with Disabilities Act, 42 U.S.C. § 12203(a), all of which contain express prohibitions against retaliatory conduct. Yet the Seventh Circuit concluded that Section 1981's prohibition of *discriminatory* contract terminations also encompasses *retaliatory* contract terminations. J.A. 137-138. That conclusion is plainly incorrect under this Court's reasoning in *Burlington Northern*.

This Court confirmed in *Burlington Northern* that anti-discrimination and anti-retaliation provisions are not always coterminous. 126 S. Ct. at 2412. As the Court explained, the two provisions serve two different purposes. Substantive provisions barring discrimination on the basis of an individual's race or other protected characteristics "seek[ ] to prevent injury to individuals based on who they are, *i.e.*, their status." *Id.* Anti-retaliation provisions, by

contrast, "seek[ ] to prevent harm to individuals based on what they do, *i.e.*, their conduct," regardless of whether they are also members of a protected class. *Id.* Thus, for example, Title VII, which bars employment discrimination against "any individua * * * because of such individual's race, color, religion, sex, or national origin" (*i.e.*, an individual's status), 42 U.S.C. § 2000e-2(a)(1),(2), contains a *separate* provision prohibiting retaliation against employees who "oppose[ ]" discriminatory conduct or "participate[ ] in" proceedings to enforce Title VII rights (*i.e.*, an individual's conduct). *Id.* § 2000e-3(a). If Title VII's substantive anti-discrimination provision itself prohibited retaliation, then the statute's separate anti-retaliation provision, like those in many other federal statutes, would be superfluous.

Section 1981 is an anti-discrimination provision of the kind described in *Burlington Northern*. Subsection (a), which guarantees to "[a]ll persons * * * the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens," 42 U.S.C. § 1981(a), by its terms prohibits harm based on an individual's *status*, not his or her conduct. The statute prohibits discrimination based on the individual victim's race. *See Domino's*, 546 U.S. at 480 ("Section 1981 plaintiffs must identify injuries flowing from a *racially* motivated breach of their own contractual relationship") (emphasis added); *see also McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (construing Section 1981 to apply to whites as well as non-whites). Nothing in the plain language of subsection (a) additionally prohibits retaliation against individuals based on conduct – for

example, a stated opposition to race discrimination in contracting.[2]

The language now codified in subsection (a), moreover, was originally enacted in 1866, decades before anti-retaliation prohibitions became the norm. *See* J.A. 160 (Easterbrook, C.J., dissenting in part) (noting that Section 1981 was enacted "long before anti-retaliation norms were created"). It is therefore impossible to impute to the statute's framers any intent implicitly to incorporate an anti-retaliation prohibition into Section 1981's plain text.

2. The Seventh Circuit majority dismissed the distinction between anti-discrimination and anti-retaliation provisions recognized in *Burlington Northern* as a "heightened degree of formalism" that was "dispensed with" by the Civil Rights Act of 1991. J.A. 138. But the court's conclusion finds no support in the 1991 Act.

Section 101 of the 1991 Civil Rights Act, codified as 42 U.S.C. § 1981(b), amended Section 1981 to define "make and enforce contracts" to "include[ ] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. I, § 101(2). The amendment was adopted "in response to *Patterson*," *Rivers*, 511 U.S.

---

[2] In some cases, the alleged retaliation victim claims to have suffered retaliation for complaining about discrimination against himself. In other cases, the plaintiff alleges retaliation for opposing discrimination against others. In both situations, the claim is based not on the plaintiff's race, but on his conduct, and is therefore not actionable under Section 1981.

at 309, which held that Section 1981, as originally enacted, did not extend to racial harassment occurring after a contract's formation. *Patterson*, 491 U.S. at 178-182.

Patterson did not address the issue of retaliation, nor does Section 101, by its plain terms, prohibit retaliation. On the contrary, the 1991 amendment retains Section 1981's focus on discrimination based on the individual victim's race. Pub. L. 102-166, § 101(1) (retaining original statutory language as 42 U.S.C. § 1981(a)). The language Congress employed to expand the meaning of the phrase "make and enforce contracts," moreover, closely tracks the substantive anti-discrimination provision of Title VII – the provision the *Burlington Northern* Court recognized does not itself prohibit retaliation. *See* 126 S. Ct. at 2412; 42 U.S.C. § 2000e-2(a)(1) (prohibiting discriminatory "refus[al] to hire," "discharge," and other discrimination "with respect to [an individual's] compensation, terms, conditions, or privileges of employment"). Had Congress intended the 1991 amendment to Section 1981 to reach retaliation, it surely would have looked to Title VII's anti-retaliation provision – rather than Title VII's substantive provision – for its model.

Congress also enacted another anti-retaliation provision elsewhere in the Civil Rights Act of 1991 itself. Title III of the 1991 Act, which extended the protections of other anti-discrimination laws to Senate employees, Pub. L. 102-166, Title III, § 302, separately prohibited "[a]ny intimidation of, or reprisal against" individuals exercising these statutory

rights. *Id.* § 312 (repealed 1995).[3] The absence of similar language in Section 101 of the 1991 Act reinforces the conclusion that Congress did not intend its amendment of Section 1981 to address retaliation. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) (when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, * * * Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citation and quotation marks omitted). *See also Gomez-Pérez* v. *Potter*, 476 F.3d 54, 59 (1st Cir. 2007) (ADEA provision barring age discrimination against federal employees does not prohibit retaliation, because another section of the same statute explicitly prohibits retaliation against private employees), *cert. granted*, __ S. Ct. __, 2007 WL 989594 (U.S. Sept. 25, 2007) (No. 06-1321).

3. The existence of explicit anti-retaliation provisions in other anti-discrimination laws, as well as in Title III of the 1991 Civil Rights Act itself, confirms what the text of Section 1981 already makes clear: the statute prohibits *discrimination* in contractual relationships, not discrimination *and retaliation.* Against this evidence, the *CBOCS* majority offers in support of its contrary conclusion only a single statement from a House Committee report. J.A. 134-135, 138. As this Court has repeatedly recognized, however, a "snippet of legislative history" that "is 'in no way anchored in the text of the statute' " is far too slender a reed on which to rest a new cause of action. *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997) (quot-

---

[3] A similar anti-retaliation provision applicable to all congressional employees now appears at 2 U.S.C. § 1317(a).

ing *Shannon* v. *United States*, 512 U.S. 573, 583 (1994)). Because the single statement on which the Seventh Circuit relies contradicts, rather than confirms, the statutory text, it cannot control. *See Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (observing that "the authoritative statement is the statutory text, not the legislative history," and recognizing the danger of relying on committee reports that permit "strategic manipulations of legislative history to secure results" that the drafters "were unable to achieve through the statutory text").

Nor can it be argued that Congress intended the 1991 amendment to restore certain lower court decisions holding that Section 1981 encompasses retaliation. This Court expressly left open the question whether *Patterson* itself had any impact on retaliation claims. *See Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). And in *Rivers*, the Court squarely rejected the argument that the 1991 Act "restor[ed]" any previously recognized rights; rather, the Act "'*expand[ed]*" Section 1981 to create new rights that did not exist before. *Rivers*, 511 U.S. at 308 (quoting Pub. L. 102-166, § 3(4)) (emphasis in original). Section 101 of the 1991 Act expanded Section 1981 to bar discrimination occurring after the formation of a contract. It did not expand the statute to bar retaliation.

* * *

Section 1981, as originally enacted, did not prohibit retaliation. The 1991 Act similarly evinces no "clear expression of congressional intent," *Rivers*, 511 U.S. at 307, to reach retaliation. Consistent with this

Court's precedents interpreting Section 1981 to protect only a "limited category of rights," *General Bldg. Contractors*, 458 U.S. at 384, the Seventh Circuit's holding that the statute prohibits retaliation therefore should be reversed.

II. *JACKSON* AND *SULLIVAN* DO NOT SUPPORT A DIFFERENT CONCLUSION.

The Seventh Circuit erred in concluding that *Jackson* and *Sullivan* "compel[ ]" the conclusion that Section 1981 prohibits discrimination *and* retaliation. J.A. 139, 144. Those two cases do not even support that result, much less compel it.

1. *Jackson* held that Title IX's prohibition on intentional sex discrimination by federal funding recipients contains an implicit retaliation prohibition. 544 U.S. at 174. The *CBOCS* majority read the Court's statement in *Jackson* that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *Jackson*, 544 U.S. at 173, to "jettison[ ]" any distinction between retaliation and discrimination claims in *all* anti-discrimination laws that do not expressly proscribe retaliation. J.A. 141.

The Seventh Circuit majority's reading of *Jackson* is overbroad and incorrect. *Jackson* held only that the particular language of Title IX is sufficiently broad to proscribe retaliation. Title IX provides that "[n]o person * * * shall, on the basis of sex, * * * be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's statutory prohibition of "discrimination" "on the basis of sex" encompasses

retaliation, the Court reasoned, because the prohibition does not focus exclusively on the individual victim's status. *Jackson*, 544 U.S. at 174. The Court took pains to observe that, "[i]f the statute provided instead that 'no person shall be subjected to discrimination on the basis of *such individual's* sex,' " Title IX would not protect those who complain about discrimination against retaliation for such conduct. *See id.* at 179 (emphasis in original).

Section 1981 does not use the word "discrimination" or the phrase "on the basis of race." It guarantees all individuals the same right to contract "as is enjoyed by white citizens." 42 U.S.C. § 1981(a). This language, just like the hypothetical "such individual" statute described in *Jackson*, focuses on the racial status of the individual contracting party. Thus under *Jackson's* reasoning, Section 1981 is not broad enough to cover those who, regardless of their race, complain about discrimination.

The *Jackson* Court also reasoned that protection against retaliation is necessary under Title IX because those who report violations of the statute often have no other recourse against retaliation, and because, in educational settings, third persons such as teachers and coaches "are often in the best position to vindicate the rights of their students." 544 U.S. at 180-181. Neither rationale applies to Section 1981.

There is no reason to suppose that victims of race discrimination in contractual relationships – including employment relationships, which constitute the

vast majority of Section 1981 cases[4] – are unable to identify and report discrimination against themselves. *See Domino's*, 546 U.S. at 479 ("Injured parties 'usually will be the best proponents of their own rights.'") (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976)). Nor is retaliation for such a report likely to go unpunished; Title VII specifically prohibits retaliation against employees who complain about race discrimination against themselves or others. 42 U.S.C. § 2000e-3(a). *See* J.A. 160 (Easterbrook, C.J., dissenting in part). Employees not covered by Title VII, moreover, frequently have other avenues of redress. For example, plaintiffs who work for employers not subject to Title VII because they have fewer than fifteen employees, 42 U.S.C. § 2000e(b), may have recourse under state civil rights laws with no or lower numerosity requirements.[5] Indeed, if

---

[4] *See, e.g.*, *Williams* v. *Federal Nat'l Mortgage Ass'n*, 2006 WL 1774252, at *6 (D.D.C. June 26, 2006) (noting that "there are few cases addressing § 1981 outside of the employment context, and even fewer cases dealing with retaliation outside the employment context under § 1981") (internal quotation marks omitted).

[5] Several state civil rights statutes define the term "employer" to include employers with one or more employees. *See, e.g.*, ALASKA STAT. § 18.80.300(5); D.C. CODE § 2-1401.02(10); HAW. REV. STAT. ANN. § 378-1; ME. REV. STAT. ANN. tit. 5, § 4553.4; MICH. COMP. LAWS ANN. § 37.2201(a); MINN. STAT. ANN. § 363A.03(16); MONT. CODE ANN. § 49-2-101(11); N.D. CENT. CODE § 14-02.4-02(8); WIS. STAT. ANN. § 111.32(6)(a). Others contain minimums significantly lower than Title VII's. *See, e.g.*, CAL. GOV'T CODE § 12926(d) (5 or more employees); CONN. GEN. STAT. ANN. § 46a-51 (3 or more); DEL. CODE ANN. tit. 19, § 710(6) (4 or more); IDAHO CODE ANN. § 67-5902(6) (5 or more); KAN. STAT. ANN. § 44-1002(b) (4 or more); N.M. STAT. ANN.

Humphries had worked for a small employer not covered by Title VII, he might have been able to sue for retaliation under the Illinois Human Rights Act, which does not impose any numerosity requirement for retaliation claims. *See Dana Tank Container, Inc.* v. *Human Rights Comm'n*, 687 N.E.2d 102, 104 (Ill. App. Ct. 1997).[6] This plainly is not a case in which "all manner of [Section 1981] violations might go unremedied" if a retaliation provision were not shoehorned into the statute. *Jackson*, 544 U.S. at 180.

2. *Sullivan*, for its part, rested on concerns similar to those at issue in *Jackson* and thus absent here. *Sullivan* held that a white person had standing to sue under 42 U.S.C. § 1982, which prohibits race discrimination with respect to property rights, when he was expelled from membership in a community recreational facility after protesting his inability to lease his membership to a black person. Analogizing the situation to a racially restrictive covenant, the Court allowed the suit, noting that in such cases "the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant.'" *Sullivan*, 396 U.S. at 404 (quoting *Barrows* v. *Jackson*, 346 U.S.

---

§ 28-1-2(B) (same); N.Y. EXEC. LAW § 292(5) (same); OHIO REV. CODE ANN. § 4112.01(A)(2) (same).

[6] *See also* 775 ILL. COMP. STAT. ANN. 5/6-101(A). Several other state statutes similarly do not limit the application of their anti-retaliation provisions to statutory "employers." *See, e.g.*, D.C. CODE § 2-1402.61(a); IDAHO CODE ANN. § 67-5911; IOWA CODE ANN. § 216.11.2; MASS. GEN. LAWS ANN. CH. 151B, § 4(4); MONT. CODE ANN. § 49-2-301; N.H. REV. STAT. ANN. § 354-A:19; N.M. STAT. ANN. § 28-1-7(I)(2); N.D. CENT. CODE § 14-02.4-18; OHIO REV. CODE ANN. § 4112.02(I).

249, 259 (1953)). No alternative remedy was available when *Sullivan* was decided; the recently enacted Fair Housing Act, 42 U.S.C. §§ 3601-3631, was inapplicable to the pre-enactment conduct at issue in the case. *Sullivan*, 396 U.S. at 240. Here, by contrast, third parties are unnecessary to vindicate the equal right to contract protected by Section 1981, and there is generally an effective alternative remedy for persons who report violations of the statute who thereafter are retaliated against.

The Court also has long since abandoned the *Sullivan* Court's approach of "supplement[ing] statutes to make them 'more effective,' " regardless of whether the supplementation has any basis in the statutory text. J.A. 163-165 (Easterbrook, C.J., dissenting in part). Unless there exists statutory evidence of Congress's intent to create a cause of action, that "cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-287. *See also Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original).

The *Sandoval* Court rejected a claim that Title VI, which proscribes intentional race discrimination by federal funding recipients, 42 U.S.C. § 2000d, contains a private right of action to enforce disparate impact regulations promulgated under it. *Sandoval*, 532 U.S. at 285-293. As this Court explained, the once-prevalent "understanding * * * that 'it is the

duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed in a statute," *id.* at 287 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)), was abandoned in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), and the Court has "not returned to it since" – even when construing a statute previously interpreted under the now-rejected method. *Sandoval*, 532 U.S. at 287 (citing *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), and other cases construing the Securities Exchange Act of 1934).

Finding no evidence of congressional intent in "the text and structure of Title VI" to create the proposed private right of action, the *Sandoval* Court held that the cause of action did not exist. 532 U.S. at 289. It reached this conclusion even though "every Court of Appeals to address the issue" had found that the proposed private right of action was compelled by prior Supreme Court precedents. *Id.* at 294 (Stevens, J., dissenting).

Sandoval's reasoning applies with equal force here. As discussed in Part I, above, nothing in the text or structure of Section 1981 or the Civil Rights Act of 1991 evinces Congress's intent to include in Section 1981 a cause of action for retaliation. Neither *Jackson* nor *Sullivan* hold to the contrary. Even if a retaliation prohibition might be thought useful in limited circumstances to effectuate Section 1981's antidiscrimination prohibition, a prohibition on retaliation cannot be implied absent support in the statute itself – for which there is none. The *Sandoval* Court, having "sworn off the habit of venturing beyond

Congress's intent," declined to "accept [the] invitation to have one last drink." 532 U.S. at 287. This Court should hold equally fast.

3. The *Jackson* Court's partial reliance on *Sullivan* does not require the Court to resurrect in this case the long-since-discarded interpretive method *Sullivan* embraced. *Jackson* found *Sullivan* relevant to the Title IX interpretation issue in that case because *Sullivan* was decided just three years before the enactment of Title IX, and it therefore illumined Congress's expectations as to how Title IX would be interpreted. *Jackson*, 544 U.S. at 176 (" '[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it].' ") (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979)).

It was fair enough for the *Jackson* Court to consult *Sullivan* for insight into Congress's intent behind Title IX. But by the same reasoning, then, Congress's amendment of Section 1981 in the 1991 Civil Rights Act should be construed not in light of *Sullivan*, but rather in light of the interpretive method that the Court in *Patterson* applied to Section 1981. *Patterson* makes abundantly clear that claims are not cognizable under Section 1981 unless they are clearly mandated by the statutory text. *See Patterson*, 491 U.S. at 178-182. The legal context in which the 1991 amendment was enacted thus reinforces the conclusion that, had Congress intended to create a cause of action for retaliation in Section 1981, it would have done so explicitly. *See* J.A. 165 (Easter-

brook, C.J., dissenting in part) ("There has been a sea change in interpretive method between *Sullivan* and today – and *Patterson* not only exemplifies the change but also applies it to § 1981.").

The 1991 Civil Rights Act may have superseded *Patterson's* holding regarding the scope and meaning of the statutory term "make and enforce contracts," but the 1991 Act did not (indeed could not) overrule *Patterson's reasoning*. The Court made just this point in *Domino's*, its most recent Section 1981 case. Citing *Patterson*, *Domino's* held that "the plain text of the statute" precludes Section 1981 claims by plaintiffs who lack rights under the relevant contract. *Domino's*, 546 U.S. at 476-477, 479-480.[7]

* * *

For all of these reasons, the Seventh Circuit majority erred in concluding that *Sullivan* and *Jackson* require recognition of an implicit cause of action for retaliation under Section 1981. The Court's recent decisions construing Section 1981, including *Domino's*, *Patterson*, and *Rivers*, provide the appropriate interpretive model. Consistent with these precedents, the Court should hold that, because there is no basis for it in the text or structure of the statute, Section 1981 contains no cause of action for retaliation.

---

[7] Notably, the Court was expressly invited in *Domino's* to rely on *Sullivan*; it declined to do so. *See* Brief for the Respondent at *6, 8, 12 n.6, 34-36, 40, *Domino's Pizza, Inc.* v. *McDonald*, 547 U.S. 470 (2006) (No. 04-593), 2005 WL 2367598.

III. ENGRAFTING A RETALIATION PROHIBITION ONTO SECTION 1981 WOULD UNNECESSARILY UNDERMINE TITLE VII'S CONCILIATION PROCESS.

Engrafting onto Section 1981 a retaliation prohibition that has no basis in the text also will have significant adverse consequences for employers and employees. The cause of action recognized by the Seventh Circuit allows an employee claiming to have suffered retaliation for reporting race discrimination to file a lawsuit under Section 1981 outside of Title VII's limitations period, and without Title VII's mandatory conciliation procedures.

There is no doubt that plaintiffs can proceed simultaneously under Title VII and Section 1981 when both statutes confer overlapping rights. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). But it does not follow that, in determining whether Section 1981 confers a parallel right in the first instance, courts must blind themselves to the conflicts that recognizing such a right would create. As the Court stated in *Patterson*:

> We agree that * * * there is some necessary overlap between Title VII and § 1981, and that where the statutes do in fact overlap we are not at liberty "to infer any positive preference for one over the other." We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. [*Patterson*, 491 U.S. at 181 (quoting *Johnson*, 421 U.S. at 461).]

The *Patterson* Court reasoned that the availability of Title VII as an alternative remedy for victims of racial harassment "should deter us from a tortuous construction of [Section 1981] to cover this type of claim." 491 U.S. at 181. So too here. Section 1981 does not contain a retaliation prohibition, and the Court similarly should consider the practical consequences of engrafting such a prohibition onto the statute.

Those consequences would be significant in two respects. *First*, plaintiffs alleging retaliation for reporting discrimination based on race – but not based on sex, religion, or other protected characteristics – could disregard the limitations period that Congress determined in Title VII should apply to all such retaliation claims. Title VII requires plaintiffs to file a charge with the Equal Employment Opportunity Commission (EEOC) within either 180 or 300 days of the alleged violation as a prerequisite to proceeding in court. 42 U.S.C. § 2000e-5(e)(1), (f)(1). Section 1981 contains no similar requirement, and it is unclear what limitations period would apply to a retaliation claim under the statute. If retaliation were prohibited by Section 1981(b) (and it plainly is not), then the federal four-year catchall statute of limitations would apply. *See* 28 U.S.C. § 1658(a) ("[A] civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues."); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (applying § 1658 to discriminatory termination, transfer, and hostile environment claims under § 1981, because such claims were not possible prior to the 1991 amendment). If, however, retaliation

were prohibited by Section 1981(a) (again, it clearly is not), then the most appropriate state limitations period would govern. *Donnelley*, 541 U.S. at 382. In either event, the limitations period that Congress decided in Title VII should apply to retaliation claims would be eviscerated.

The risk of stale claims is substantial in retaliation cases, because they so often turn on questions of intent. Memories fade, potential witnesses may leave the defendant's employ, and relevant personnel documents may not be retained in the ordinary course of business. *See* 29 C.F.R. § 1602.14 (requiring employers to preserve "personnel or employment record[s]" for one year from the date of their making or from employee's discharge). Thus, "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened," *Ledbetter*, 127 S. Ct. at 2170, to the detriment of both the employer and the employee, who carries the ultimate burden of proof. That is why this Court has repeatedly recognized that " 'strict adherence' " to Title VII's filing deadlines " 'is the best guarantee of evenhanded administration of the law.' " *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 108 (2002) (quoting *Mohasco* v. *Silver*, 447 U.S. 807, 826 (1980)). Indeed, just last Term the Court reiterated that Title VII's statute of limitations is vital to " 'protect[ing] employers from the burden of defending claims arising from employment decisions that are long past.' " *Ledbetter*, 127 S. Ct. at 2170 (quoting *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-257 (1980)). All of these legal and practical justifications for requiring prompt filing of retaliation claims would be frustrated if employees

could bring suit under Section 1981 years after the alleged injury.

Second, the Court also has recognized the importance of Title VII's " 'integrated, multistep enforcement procedure,' " *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977)), in securing administrative resolution of charges and thus enabling employers and employees to avoid the time and expense of formal litigation. *See Shell*, 466 U.S. at 78 (noting Congress's objective in Title VII to remedy "violations of the statute * * * without resort to the courts"); *see also W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 770-771 (1983) ("Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII.") (citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

The EEOC resolves a significant number of charges annually, including retaliation charges, which in the last decade have been filed with increasing frequency. *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/enforcement.html (last viewed Nov. 6, 2007). Even when charges are not successfully conciliated, the administrative process allows both parties to assess the strength of their relative positions prior to litigation. *See EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case, as well as his own.").

Title VII also requires that the EEOC notify the employer within ten days when a charge is filed against it, 42 U.S.C. § 2000e-5(b) – long before, and perhaps even *years* before, a defendant receives notification of a Section 1981 claim when it is first filed in court. Title VII's notice requirement allows employers to redress unlawful practices promptly and to retain records necessary to determine the intent behind challenged employment decisions. And when the alleged retaliation is a decision, such as a failure to promote, that falls short of termination, early notification often enables employers to work directly with complainants to resolve the dispute before it escalates into full-blown litigation. Pre-litigation conciliation thus facilitates efforts to salvage ongoing employment relationships in which both employer and employee have made significant investments.

All of these important goals would be utterly thwarted if employees alleging retaliation for reporting race discrimination could wait years without notifying the employer of their grievances – and then commence full-scale litigation. This Court should not reach out to create a cause of action that would so deeply undermine Title VII's comprehensive enforcement and conciliation scheme.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CATHERINE E. STETSON *
JONATHAN T. REES
AMY FOLSOM KETT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

* Counsel of Record

Counsel for Amicus Curiae

55294a

(6)

22pp

No. 06-1431

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Legal Foundation

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Counsel

November 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE PANEL MAJORITY BELOW IMPROPERLY READ INTO SECTION 1981 A PROTECTION THAT SIMPLY IS NOT CONTAINED IN THE ACT	9
A. Neither the Original Text of Section 1981 Nor Its 1991 Amendment Contains the Term "Retaliation"	9
B. Retaliation Is Not Discrimination Because of Race	14
II. RECOGNIZING A CAUSE OF ACTION FOR RETALIATION UNDER SECTION 1981 WILL ENCOURAGE PLAINTIFFS TO BYPASS TITLE VII'S WELL-ESTABLISHED ENFORCEMENT MECHANISM, THUS DEPRIVING EMPLOYERS OF THE BENEFIT OF TIMELY NOTICE AND EXPEDITIOUS RESOLUTION OF RETALIATION CLAIMS	16
CONCLUSION	18

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 17

Burlington Northern Railroad v. Oklahoma Tax Commission, 481 U.S. 454 (1897) 12

Domino's Pizza, LLC v. McDonald, 546 U.S. 470 (2006) ..... *passim*

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) 15

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 4

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) 5, 6, 14

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 3, 4, 16, 17

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 3

Russello v. United States, 464 U.S. 16 (1983) 12

FEDERAL STATUTES

Age Discrimination in Employment Act of 1967,

29 U.S.C. §§ 621 *et seq.* 7

29 U.S.C. § 623(d) 14, 15

Americans with Disabilities Act of 1990,

42 U.S.C. §§ 12101 *et seq.* 7

42 U.S.C. § 12203(a) 14, 15

Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1074 (1991) 5, 16

Equal Pay Act of 1963,

29 U.S.C. § 206(d) 7

TABLE OF AUTHORITIES—Continued

Page

Fair Labor Standards Act of 1938,
29 U.S.C. §§ 201 *et seq.* 7
29 U.S.C. § 215(a)(3) 14, 15

Family Medical and Leave Act of 1993,
29 U.S.C. §§ 2601 *et seq.* 7
29 U.S.C. § 2615(a) 14, 15

Section 1981 of the Civil Rights Act of 1866,
42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1981(a) 9
42 U.S.C. § 1981(b) 7, 9

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.* ..... *passim*
42 U.S.C. § 2000e-2(a) 13
42 U.S.C. § 2000e-3(a) 13, 15
42 U.S.C. § 2000e-5(b) 17

Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* 6

LEGISLATIVE HISTORY

H.R. Rep. No. 102-40, pt. 1 (1991) 11

IN THE

Supreme Court of the United States

No. 06-1431

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and the National Federation of Independent Business Legal Foundation respectfully submit this brief as *amici curiae*. The brief urges reversal of the decision below and thus supports the position of Petitioner CBOCS West, Inc. before this Court.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

Amici's members are employers or representatives of employers that are subject to Section 1981 of the

---

other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Civil Rights Act of 1866 (Section 1981), as amended, 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*; and other federal employment-related laws and regulations. As potential defendants to claims under these laws, *amici's* members have a direct and ongoing interest in the issue presented before this Court regarding whether a cause of action for retaliation is available under 42 U.S.C. § 1981. A divided panel of the Seventh Circuit erroneously found that Section 1981's plain language and legislative history compel the conclusion that Congress intended to prohibit retaliation under the statute, even though it did not include any language to that effect in Section 1981's actual text.

The issue of whether retaliation claims are available under Section 1981 is of great importance to the constituency *amici* represents. While a substantial segment of EEAC's members are large corporations with tens of thousands of employees, NFIB is comprised of many small businesses for whom the cost of defending even a single lawsuit would be devastating. Creating a cause of action for retaliation under Section 1981 would greatly expand the number and scope of claims brought under the law and would undermine Title VII's well-established administrative enforcement scheme designed to resolve workplace disputes in a timely manner and without unnecessary resort to protracted litigation.

Because of their interest in matters of this nature, EEAC and/or NFIB have filed *amicus curiae* briefs in a number of cases involving § 1981 before this Court, including *Domino's Pizza, LLC v. McDonald*, 546 U.S. 470 (2006), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), *Patterson v. McLean Credit Union*,

491 U.S. 164 (1989), and *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). Given their significant experience in these matters, *amici* are well-situated to brief the Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Hedrick Humphries (Humphries) worked for Petitioner CBOCS West (hereinafter referred to as Cracker Barrel) as an associate manager in its Bradley, Illinois store. Jt. App. 118. In the last several months of his employment, Humphries received nine written and verbal warnings regarding deficient work performance, the last three of which, issued in September 2001, indicated they were "final" warnings. *Id.* at 109.

In November 2001, Humphries, who is African-American, complained to William Christensen, the Bradley store's district manager, about discriminatory employment practices. *Id.* Specifically, Humphries complained that he and Venus Green, an African-American employee who recently had been terminated by Joe Stinnett, another associate manager, were treated unfairly on the basis of race. *Id.* Christensen received the complaint, but evidently failed to conduct an investigation in accordance with Cracker Barrel's company policies. *Id.* at 119.

On December 3, Stinnett reported finding the store safe unlocked. *Id.* at 120. Humphries was on duty on December 2, and it was his responsibility pursuant to company policy to ensure the safe was closed and locked before leaving the store. *Id.* On December 5, the company terminated Humphries' employment based on his violation of company policies in failing to ensure the store safe was closed and locked on

December 2. *Id.* Humphries denied that it was he who left the store safe unlocked on December 2. *Id.*

Humphries filed an action in the United States District Court for the Northern District of Illinois, alleging he was subjected to race discrimination and retaliation, in violation of Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981 (Section 1981). *Id.* at 117. The district court dismissed the Title VII race and retaliation claims based on Humphries' failure to timely file an action within 90 days of receiving a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission (EEOC), and subsequently dismissed his Section 1981 claims, concluding he failed to establish a prima facie case of retaliation or race discrimination. *Id.* at 91.

Humphries appealed to the Seventh Circuit, which in a 2-1 decision reversed the district court's ruling in part. The panel majority reasoned Section 1981's plain language, coupled with the legislative history of the Civil Rights Act of 1991—which among other things amended Section 1981 to extend a race discrimination prohibition to post-formation conduct—"confirms that Congress intended retaliation to be included under this provision." *Id.* at 138. Conceding that "strictly speaking, a discriminatory 'termination of contract' is not the same thing as a retaliatory discharge—for instance, analytically, retaliation need not have a discriminatory intent behind it," the panel majority nevertheless determined, "the Civil Rights Act of 1991 dispensed with this heightened degree of formalism." *Id.*

In finding that a cause of action for retaliation exists under Section 1981, the panel majority relied heavily on this Court's holding in *Jackson v.*

Birmingham Board of Education, 544 U.S. 167 (2005), which addressed whether Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, prohibits retaliation for opposing alleged workplace discrimination. *Id.* at 138-144. The panel majority concluded that this Court's rationale for reading a retaliation cause of action in Title IX's definition of "to discriminate" supports a similarly broad reading of Section 1981—even though neither Title IX nor Section 1981 contain anti-retaliation provisions. *Id.*

Chief Judge Easterbrook dissented in part.[2] He took issue with the panel majority's reliance on *Jackson*, lamenting, "[t]oday this court attributes to *Jackson* the conclusion that *all* federal statutes dealing with the employment relation prohibit retaliation." *Id.* at 159. He observed, "[t]he question at issue today is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed to file a timely charge under Title VII and engage in conciliation before turning to court." *Id.* at 160. Noting, "[t]his is not the first time that a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII," *id.*, Judge Easterbrook concluded the panel majority's action in manufacturing a cause of action for retaliation under Section 1981 effectively "demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court." *Id.*

---

[2] Judge Easterbrook joined the majority in affirming the district court's dismissal of Humphries' race discrimination claim.

Cracker Barrel filed a petition for certiorari, which this Court granted on September 25, 2007.

SUMMARY OF ARGUMENT

Unlike Title VII, Section 1981 is not a comprehensive nondiscrimination law, but a narrow statutory provision that prohibits *only* intentional race discrimination in the making and enforcement of contracts. *Domino's, Inc. v. McDonald*, 546 U.S. 470, 474 (2006). Although Congress in 1991 extended Section 1981's scope to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. § 1981(b), as Judge Easterbrook in his dissenting opinion below observed, neither the original text of Section 1981 nor its 1991 amendment contains the term "retaliation." Jt. App. 161.

The panel majority below thus read into Section 1981 a protection that simply is not contained in the actual text of the law. Retaliation, *i.e.*, being subjected to an adverse employment action for having opposed a discriminatory act, is not the same as being subjected to an adverse employment action on the basis of race. Section 1981 prohibits treating individuals differently on the basis of race, and should not be read to extend to retaliation in the absence of an act of Congress expressly providing such protection.

Virtually every other federal nondiscrimination law—including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), the Equal Pay Act (EPA) and the Family and Medical Leave Act (FMLA)—contains specific

language that makes it unlawful for employers to discharge or otherwise discriminate against someone who has opposed some conduct made unlawful by the law. The fact that Congress chose not to include an anti-retaliation provision in either the initial version of the statute or the 1991 amendments to the Act further demonstrates such claims are not available under Section 1981.

By recognizing a cause of action for retaliation under Section 1981—particularly in a case in which the plaintiff was barred from proceeding on identical claims under Title VII for failure to timely file an action in federal court—the Seventh Circuit has expanded the law's reach beyond that which was contemplated by Congress. Under this rule, employees essentially are given a choice between filing a retaliation claim under Title VII—which imposes, for good reason, strict timeframes on the filing of such claims, requires administrative exhaustion as a precondition to filing suit, and places statutory caps on punitive and compensatory damages—and Section 1981, which does not. As a practical matter, such a result will force employers to defend stale claims—notice of which may never be provided until a federal complaint actually has been served—and will deprive them of the benefit of the informal conciliation and settlement mechanisms contained in Title VII's administrative enforcement procedures.

ARGUMENT

I. THE PANEL MAJORITY BELOW IMPROPERLY READ INTO SECTION 1981 A PROTECTION THAT SIMPLY IS NOT CONTAINED IN THE ACT

A. Neither the Original Text of Section 1981 Nor Its 1991 Amendment Contains the Term "Retaliation"

Section 1981 of the Civil Rights Act of 1866 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). "Among the many statutes that combat racial discrimination, § 1981, originally § 1 of the Civil Rights Act of 1866, 14 Stat. 27 (1866), has a specific function: It protects the equal right of 'all persons within the jurisdiction of the United States' to 'make and enforce contracts' without respect to race." *Domino's, Inc. v. McDonald*, 546 U.S. 470, 474 (2006).

In 1991, Congress amended Section 1981 to specify that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Although this new language expanded the definition of "to make

and enforce contracts" to encompass post-formation conduct previously rejected by this Court in *Patterson* as not actionable under Section 1981, the 1991 amendment did not include any language creating a cause of action for retaliation. Indeed, as Chief Judge Easterbrook observed in his dissenting opinion below, nowhere in the original text of Section 1981 or its 1991 amendment is the term "retaliation" even mentioned.

The panel majority below determined, "[t]he plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the 'termination of contracts,' and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract." Jt. App. 137. While acknowledging, as it must, that "strictly speaking, a discriminatory 'termination of contract' is not the same thing as a retaliatory discharge—for instance, analytically, retaliation need not have a discriminatory intent behind it," *id.* at 138, the panel majority nonetheless went on to conclude that "the Civil Rights Act of 1991 dispensed with this heightened degree of formalism, and the legislative history confirms that Congress intended retaliation to be included within section 1981." *Id.*

While a House Report on the 1991 amendments makes passing reference to the term "retaliation" in the context of workplace discrimination, its importance in establishing Congress' intent to create a retaliation cause of action under Section 1981 is very much overstated by the panel majority below. A careful review of the legislative history confirms unequivocally that Congress' clear intent in amending Section 1981 was to ensure that employees who suffer intentional workplace discrimination *on the*

basis of race are afforded the statute's full protections. Indeed, the term "retaliation" is discussed in every instance in the context of intentional race discrimination; there is no mention at all of any need to provide substantive rights for employees who are subjected to retribution by their employers for engaging in what amounts to whistleblower activity.

In its Report accompanying the House version of the proposed amendments to Section 1981, for instance, the Education and Labor Committee explained:

> Section 210 would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b). This subsection would clarify that the right to "make and enforce contracts" *free from race discrimination* includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The Committee intends this provision *to bar all race discrimination* in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring.

H.R. Rep. No. 102-40, pt. 1, at 92 (1991) (emphasis added). Nothing contained in the legislative history of the 1991 amendments suggests Congress in any way intended to fundamentally alter the nature and purpose of the statute by extending protection to those who are retaliated against by their employers for having "blown the whistle" on alleged employer

misconduct, whether or not they can state an actual claim of intentional discrimination based on *race*.

"Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotations and citations omitted). The text of Section 1981 plainly contains *no* provision making retaliation a prohibited act, and the passing references to the term "retaliation" in the legislative history of the 1991 amendments can hardly be said to evince "a clearly expressed legislative intent to the contrary." *Id.* In other words, "[t]he short answer is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations and citations omitted).

A further indication of Congress' intent to exclude retaliation claims from coverage under Section 1981 is the fact that every other major federal law prohibiting workplace discrimination contains specific language, separate and apart from the actual nondiscrimination provision, that makes it unlawful for employers to discharge or otherwise discriminate against someone who has opposed some conduct made unlawful by the statute. In addition to expressly prohibiting discrimination in the terms, conditions and privileges of employment on account of race, color, religion, sex, or national origin, for instance, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, contains a separate anti-retaliation provision, which makes it unlawful for an employer to discriminate against an employee (or applicant for employment) "because he has

opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act. 42 U.S.C. § 2000e-3(a).[3]

---

[3] Specifically, § 2000e-2(a) of Title VII, captioned, **"Unlawful employment practices,"** provides:

> (a) **Employer Practices**
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.§ 2000e-2(a) (emphasis added).

Title VII's anti-retaliation provision is found separately in § 2000e-3, **Other unlawful employment practices**, which provides:

> (a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this [subchapter].

42 U.S.C.§ 2000e-3(a) (emphasis added).

Other nondiscrimination laws contain similar anti-retaliation provisions. *See* the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203(a); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3); and the Family and Medical Leave Act (FMLA), 29 U.S.C § 2615(a). The fact that Congress chose not to include any anti-retaliation provision in the 1991 amendments to the Act further demonstrates such claims are not available under Section 1981. *See Jackson,* 544 U.S. at 190 ("If a prohibition on 'discrimination' plainly encompasses retaliation, the explicit reference to it in these statutes, as well as in Title VII, would be superfluous—a result we eschew in statutory interpretation. The better explanation is that when Congress intends to include a prohibition against retaliation in a statute, it does so.") (Thomas, J., dissenting).

Neither a plain reading of Section 1981's text nor its legislative history supports the panel majority's conclusion that retaliation claims are viable under the statute. Furthermore, "[l]ack of an anti-retaliation norm in § 1981 would not hinder enforcement of civil rights laws, because there is a *real* anti-retaliation rule in Title VII of the Civil Rights Act of 1964." Jt. App. 160. Accordingly, the panel majority's decision below is erroneous and thus should be reversed by this Court.

B. Retaliation Is Not Discrimination Because of Race

Section 1981 prohibits intentional race discrimination in the contractual relationship. *Domino's Pizza, LLC v. McDonald,* 546 U.S. 470, 476 (2006). "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category

of rights, specifically defined in terms of racial equality." *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982) (citation omitted). Retaliation is not discrimination "because of race." Rather, it is retribution or punishment for having engaged in some type of activity, such as blowing the whistle on alleged employer misconduct. *See, e.g.* Title VII, 42 U.S.C. § 2000e-3(a), ADA, 42 U.S.C. § 12203(a); ADEA, 29 U.S.C. § 623(d); FLSA, 29 U.S.C. § 215(a)(3); FMLA, 29 U.S.C § 2615(a). As the panel majority admitted below, retaliation need not be—and, indeed, often is not—related to actual, intentional discrimination of *any* kind, much less that which is based on race.

The crux of Respondent's claim below is that he was discharged in retaliation for having "blown the whistle" on alleged discriminatory employment practices. Yet, as the district court found and the Seventh Circuit below affirmed, Respondent failed to show that his termination was motivated by intentional racial animus, a required element of a Section 1981 claim. *See* Jt. App. 115 ("Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the presentation he makes in his opposition papers that only the retaliation claim has any vitality"). As Chief Judge Easterbrook observed, "[f]or all this record shows, Cracker Barrel fires every complainer, without regard to the subject of the complaint. An employer that treats everyone the same in this respect complies with § 1981." Jt. App. 166.

Since the plain text of Section 1981—both in its original and amended forms—does not create a cause of action for retaliation, the panel majority below was wrong to allow Respondent's claim to proceed under

Section 1981. To do so improperly reads into the statute a prohibition that simply does not exist, and diminishes Congress' singular purpose in enacting the law—to eradicate impermissible considerations of race in the making and enforcement of contracts. As this Court explained in *Patterson*:

> The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere. Nevertheless, in the area of private discrimination, to which the ordinance of the Constitution does not directly extend, our role is limited to interpreting what Congress may do and has done.

Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989), *superceded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991); *see also Domino's Pizza,* 546 U.S. at 479 ("Trying to make [Section 1981] a cure-all not only goes beyond any expression of congressional intent, but would produce satellite § 1981 litigation of immense scope").

II. RECOGNIZING A CAUSE OF ACTION FOR RETALIATION UNDER SECTION 1981 WILL ENCOURAGE PLAINTIFFS TO BYPASS TITLE VII'S WELL-ESTABLISHED ENFORCEMENT MECHANISM, THUS DEPRIVING EMPLOYERS OF THE BENEFIT OF TIMELY NOTICE AND EXPEDITIOUS RESOLUTION OF RETALIATION CLAIMS

Both Section 1981 and Title VII prohibit intentional race discrimination. Unlike Title VII, however,

Section 1981 contains no enforcement mechanism other than private suits in federal court. Title VII, by contrast, contains detailed procedures for correcting suspected workplace discrimination. Whenever a complainant files a charge of discrimination or retaliation under Title VII, for instance, the EEOC statutorily is required to provide the employer-respondent with notice of the charge and to investigate the allegations. 42 U.S.C. § 2000e-5(b). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

As this Court observed in *Patterson*, "[w]here conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to these statutory prerequisites." 491 U.S. at 181. This Court thus "should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.*

Permitting retaliation causes of action to proceed under Section 1981 invariably will encourage workers to bypass Title VII's detailed, administrative enforcement procedures entirely. This is especially true of those, like Respondent, who sit on their rights by failing to file timely Title VII actions within the prescribed limitations period. Chief Judge Easterbrook made a similar observation in his dissent below, pointing out that permitting retaliation claims under Section 1981 "demolishes components of Title VII that Congress thought necessary to expedite the

resolution of disputes and resolve many of them out of court . . . such as short periods of limitations that employees find inconvenient." Jt. App. 160.

Depriving employers of prompt notice of workplace claims prevents early detection and correction of potentially discriminatory employment practices. More importantly, however, it eliminates the opportunity for informal resolution of disputes without resort to protracted litigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Legal Foundation

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Counsel

November 2007

57638 B

MOTION FILED

JAN 3 - 2008 30pp

No. 06-1431

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF HISTORIANS Mary Frances Berry, Paul Finkelman, Robert J. Kaczorowski, Stanley N. Katz, David Levering Lewis, Leon F. Litwack, James M. McPherson, William M. Wiecek and 40 other Scholars SUPPORTING RESPONDENT

CHARLES J. OGLETREE, JR.
THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE
125 Mount Auburn Street
Third Floor
Cambridge, MA 02138
(617) 495-8285

MELISSA HART
Counsel of Record
UNIVERSITY OF COLORADO LAW SCHOOL
UCB 401
Boulder, CO 80309
(303) 735-6344

Attorneys for *Amici* Historians

January 3, 2008

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

No. 06-1431

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION of HISTORIANS Mary Frances Berry, Paul Finkelman, David Lewis Levering, Robert J. Kaczorowski, Stanley N. Katz, Leon F. Litwack, James M. McPherson, William M. Wiecek and 40 other scholars FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to this Court's rule 37.3(b), the Historians listed above hereby request leave to file the accompanying *amicus curiae* brief supporting the respondent. Counsel for respondent has consented to the filing of this brief. Counsel for petitioner CBOCS West, Inc. has withheld consent.

The question presented in this case is whether 42 U.S.C. § 1981 includes a claim for retaliation. Section 1981 was originally enacted as a part of the Civil Rights Act of 1866. Both petitioner and respondent have noted quite correctly that the historical context of the statute's enactment is relevant to its current interpretation. The issue before the Court in this case requires an understanding of the evils the Reconstruction Congress sought to address and the tools they used to do so when the Civil Rights Act was passed more than 140 years ago. The *Amici* are historians who have carefully studied race relations, the Civil War and the Reconstruction period. As historians, *Amici*'s professional responsibility is to explain and contextualize historical facts. Accordingly, they are particularly qualified to provide the Court with a historical perspective on the interpretive question presented in this dispute. For these reasons, *Amici* respectfully request leave to file the accompanying amicus curiae brief.

January 3, 2008

Respectfully submitted,



Melissa Hart
Counsel of Record
UNIVERSITY OF COLORADO
LAW SCHOOL
UCB 401
Boulder, CO 80309
(303) 735-6344

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Civil Rights Act of 1866 Must Be Understood in the Broader Context of Reconstruction Politics and Legislation 4

II. The Freedmen Faced Regular and Violent Retaliation When They Sought to Make or Enforce Contracts 7

III. The Right to Enforce a Contract Includes a Right Not to be Retaliated Against for Asserting Rights Under the Contract 14

CONCLUSION 18

APPENDIX A

TABLE OF AUTHORITIES

CASES:

Choudhury v. Polytechnic Inst. of New York,
735 F.2d 38 (2d Cir. 1984) 17

Facaca v. Clements,
506 F.2d 956 (5th Cir. 1975) 17

Jackson v. Birmingham Bd. of Educ.,
125 S. Ct. 1497 (2005) 17

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 15

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 15-16, 17

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 16, 17

Skinner v. Total Petroleum, Inc.,
859 F.2d 1439 (10th Cir. 1988) 17

Winston v. Lear-Siegler, Inc.,
558 F.2d 1266 (6th Cir. 1977) 17

STATUTES AND OTHER LEGISLATIVE MATERIALS:

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) .. 5

42 U.S.C. § 1981 ..... 1, 5, 17

42 U.S.C. § 1981(b) 15

42 U.S.C. § 1982 ..... 16, 17

Civil Rights Act of 1991,
Pub. L. No. 102-166, 105 Stat. 1071 ..... 5, 16

Congressional Globe, 39th Cong., 1st Sess. (1866)
..... 6, 9, 14, 16

Reports of Asst. Comm. Of the Freedmen's
Bureau, 1865-66, S. Exec. Doc. No. 27,
39th Cong., 1st Sess. (1866) 11

Report of Carl Schurz on the States of South
Carolina, Georgia, Alabama, Mississippi
and Louisiana, 1865, S. Ex. Doc. No. 2,
39th Cong., 1st Sess. (1865) 8-9, 10, 11, 12

Report of the Commissioner of the Bureau of
Refugees, Freedmen and Abandoned
Lands, 1865, H.R. Ex. Doc. No. 11, 39th
Cong., 1st Sess. (1865) 8

Report of the Joint Committee on
Reconstruction, H.R. Rep. No. 30, 39th
Cong., 1st Sess. (1866) 9

S. Rep. 693, 46th Cong., 2nd Sess. (1880) 13

OTHER AUTHORITIES:

Barry Crouch, *A Spirit of Lawlessness: White
Violence; Texas Blacks, 1865-68*, 18 J.
Soc. History 217 (Winter, 1984) 8, 13

W.E.B. Du Bois, *Black Reconstruction in America, 1860-1880* (1935) 10

Charles Fairman, *Reconstruction and Reunion 1864-88* (1971) 7

Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temple Pol. & Civ. Rts. L. Rev. 389 (2004) 6, 9, 12

Eric Foner, *Reconstruction: America's Unfinished Revolution--1863-1877* (1988) 6, 8, 10, 12

John Hope Franklin & Alfred A Moss, Jr., *From Slavery to Freedom: A History of African Americans* (8th ed. 2000) 7

Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-76* (1985) 7, 15

Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 579-90 (1989) 16

Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* (1979) 12

Dorothy Sterling, ed., *The Trouble They Seen: The Story of Reconstruction in the Words of African Americans* (1994) 10, 11, 12

INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of the above-named historians and those listed in Appendix A, who respectfully urge the Court not to eliminate the protection against retaliation afforded by 42 U.S.C. § 1981.

The issue before the Court in this case requires an understanding of the evils the Reconstruction Congress sought to address and the tools they used to do so when the Civil Rights Act was passed more than 140 years ago. The *Amici* are scholars who have carefully studied American legal history, race relations, the Civil War and the Reconstruction period.

Dr. Mary Frances Berry is the Geraldine R. Segal Professor of American Social Thought and Professor of History at the University of Pennsylvania, a former Commissioner and Chair of the U.S. Commission on Civil Rights. Dr. Berry has published numerous books on American Legal History and in particular on slavery, the Civil War and the Reconstruction era.

Dr. Paul Finkelman is the President William McKinley Distinguished Professor of Law and Public Policy at the Albany Law School. He has published over 20 books and more than 100 articles, with a

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

particular focus on slavery, race, civil rights and the Constitution.

Dr. Stanley N. Katz is a Lecturer with the rank of Professor at the Woodrow Wilson School at Princeton University. He has written and edited several books and articles on United States history and has served as president of the Organization of American Historians, the American Society for Legal History and the American Council of Learned Societies.

Dr. Robert J. Kaczorowski is a Professor of Law at the Fordham Law School. He has authored numerous books and articles on the Reconstruction amendments to the Constitution and the civil rights legislation of the era.

Dr. David Levering Lewis is the Julius Silver University Professor and Professor of History at New York University. His is a former president of the Society of American Historians and a fellow of the American Academy of Arts and Sciences. Dr. Lewis's biography of W.E.B. Du Bois earned two Pulitzer Prizes.

Dr. Leon F. Litwack is the Alexander F. and May T. Morrison Professor of History Emeritus at the University of California at Berkeley. He has written extensively on the subjects of slavery and African-American history. His book on the experience of the freedmen during Reconstruction was awarded the Pulitzer Prize in history and the American Book Award.

Dr. James M. McPherson is the George Henry Davis '86 Professor Emeritus of United States History at Princeton University and a past president

of the American Historical Association. He received the Pulitzer Prize for his 2003 Civil War history, *Battle Cry of Freedom*.

Dr. William M. Wiecek is the Chester Adgate Congdon Professor of Public Law and Legislation and a Professor of History at Syracuse University. He has written extensively on slavery and abolition, and on the nineteenth-century development of the constitution.

As historians, *Amici*'s professional responsibility is to explain and contextualize historical facts. Accordingly, they are particularly qualified to provide the Court with a historical perspective on the interpretive question presented in this dispute.

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy.

SUMMARY OF ARGUMENT

Congress passed the Civil Rights Act of 1866 in part as a response to reports of persistent interference with the rights of freed slaves to contract for paid work and then to receive the compensation they had earned. Among the reports the legislature received were numerous stories of freedmen who performed their obligations under a contract of

employment and then found themselves subject to ridicule, abuse and violence when they sought to enforce their right to be paid under the agreement. Other reports described freedmen who were punished with violence and imprisonment in response to their efforts to seek redress for nonpayment. And still others told stories of freedman who, in exercising their rights *not* to contract with particular employers, faced violent retaliation.

These reports provide the best evidence of what the 39th Congress sought to achieve in guaranteeing all citizens the rights that white citizens enjoyed to "make and enforce contracts." The events surrounding the passage and enforcement of the Civil Rights Act of 1866 demonstrate the integral role that reprisals and the fear of reprisals played in withholding from the freed slaves their right to enter into and enforce contracts. Protection from retaliation was an important element of the enforcement of contractual rights when the law was first passed, and it remains so today.

ARGUMENT

I. The Civil Rights Act of 1866 Must Be Understood in the Broader Context of Reconstruction Politics and Legislation

As enacted on April 9, 1866, Section 1 of the Civil Rights Act provided that

> [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, shall have the same right,

> in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens...

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. Codified today at 42 U.S.C. § 1981, the portion of the 1866 law guaranteeing the right to "make and enforce contracts" remained largely unchanged from the time of its enactment until the clarifying amendments of 1991. The 1991 Amendments did not change the core protections guaranteed by the original statute, but simply clarified their breadth in response to a 1989 decision of this Court. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

The Court has been asked in this case to interpret the scope of the right to "make and enforce contracts" within the meaning of § 1981. In particular, this case raises the question whether the right to make and enforce contracts on the same terms as white citizens encompasses a prohibition against retaliation for the assertion of contract rights. This is a question that can only be answered with some appreciation of the context within which the 39th Congress was legislating.

The bill that would become the Civil Rights Act was brought to the legislature in early 1866, just a month after ratification of the Thirteenth Amendment. It was introduced as a measure to enforce that Amendment and to address the persistent and widespread discrimination that

freedmen faced in the South. *See* Congressional Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull, introducing the bill in the Senate). Slavery had been abolished, but former slaves were still being denied basic civil rights. Mistreatment of the freedmen came through local and individual resistance to their new status as well as through the more formal mechanisms of the Southern states' newly enacted 'Black Codes,' which defined and limited the rights of the ex-slaves. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877,* 199-200 (1988) (hereinafter "*Reconstruction*"); Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temple Pol. & Civ. Rts. L. Rev. 389, 402-409 (2004) (hereinafter "*Historical Context of the Fourteenth Amendment*").

Congress debated and passed the Civil Rights Act against a backdrop of reports of startling violence against the former slaves, including regular floggings, whippings, castration and murder. *Id.* at 404-408. Much of that violence was directed at the efforts of freedmen to make and enforce contracts for paid labor. Among other instances of brutality, the years following the Civil War saw regular reprisals by white landowners and others against former slaves who sought to exercise their contractual rights. Reports from the Bureau of Refugees, Freedmen and Abandoned Lands (the Freedmen's Bureau) and others who traveled the South or received testimony about the conditions there gave Congress a clear and detailed picture of the hurdles the former slaves faced in their efforts to assert the basic rights of citizenship.

Moreover, the Civil Rights Act of 1866 was part of a larger body of legislation aimed at restoring order

and ensuring civil rights to freedmen in the South and throughout the nation. Thus, the Act should be interpreted in light of the larger corpus of laws—including the Freedmen's Bureau Acts of 1865 and 1866, the Enforcement Act of 1870, and the Thirteenth and Fourteenth Amendments to the Constitution—that sought to define and protect a new civil status for the freed people. *See* Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights—1866-1876*, 13 (1985) (hereinafter *"The Politics of Judicial Interpretation"*); C. Fairman, *Reconstruction and Reunion 1864-88,* 1117-1206 (1971); John Hope Franklin & Alfred A Moss, Jr., *From Slavery to Freedom: A History of African Americans* 252 (8th ed. 2000).

II. The Freedmen Faced Regular and Violent Retaliation When They Sought to Make or Enforce Contracts

The years following emancipation were a time of widespread violence against the freedmen in the South. That violence was often an incident of the former slaves' attempts to act as free laborers – making, declining or enforcing contractual arrangements. Indeed,

> the largest number of violent acts stemmed from disputes arising from black efforts to assert their freedom from control by their former masters. Freedmen were assaulted and murdered for attempting to leave plantations, disputing contract settlements, not laboring in the manner desired by their

> employers, attempting to buy or rent land, and resisting whippings.

Reconstruction, 121. A detailed study of violent conduct in the state of Texas found that "[w]hen Texas blacks decided to control their own labor and make the best arrangements with whom and where they worked, their actions provoked physical assaults, injuries and even death." Barry Crouch, *A Spirit of Lawlessness: White Violence; Texas Blacks, 1865-68*, 18 J. Soc. History 217, 222 (Winter, 1984) (hereinafter *"A Spirit of Lawlessness").* Data from other states reveal the same patterns.

These data were before Congress as it considered the enactment of the 1866 Civil Rights Act. Several different reports on the status of former slaves in the South, and on the progress of the Freedmen's Bureau, offered the legislators a picture of the difficulties attendant to the transition from slave to free labor. Freedmen's Bureau Director Oliver Otis Howard prepared a lengthy report to Congress, observing repeatedly the difficulties attendant to compelling both former masters and former slaves to participate in labor contracts. Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands, 1865, H.R. Ex. Doc. No. 11, 39th Cong., 1st Sess. (1865) (hereinafter "Howard Report"). Major General Carl Schurz traveled throughout the South, interviewing people and observing conditions in the ex-Confederate states and reported his findings to Congress in an influential document replete with stories of Southern violence stemming from the "prevailing sentiment" that "you cannot make the negro work without physical compulsion." Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi and Louisiana, 1865, S. Ex.

Doc. No. 2, 16, 73-74, 91, 39th Cong., 1st Sess. (1865) (hereinafter "Schurz Report"). The Joint Committee on Reconstruction heard testimony about conditions in the Southern states that further corroborated the extent of the violence. This extensive testimony was contained in the Committee's final report. Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866) (hereinafter "Report on Reconstruction"). All three of these reports, as well as personal letters and communication detailing mistreatment of the ex-slaves, were frequently referenced in the legislative debates on the Civil Rights Act. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 39-40, 93-95, 1159-60, 1833-35, 1838-39.

In these and other reports, Congress confronted a landscape of violent contract "negotiation." Many southern white landowners had difficulty conceiving of the former slaves as possessing the right to enter into labor contracts. A report from Virginia explained that, in some cases, blacks were tied up by the thumbs if they did not agree to work for the price set by landowners and then were forced to sign contracts "agreeing" to the price when they could no longer stand the pain. Report on Reconstruction, pt. ii, 55. One observer reported that "[t]here is a disposition on the part of [white] citizens to secure, as far as possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves." *Id.*, pt. ii, 123. *See also Historical Context of the Fourteenth Amendment*, at 403 (detailing the ways in which contract "rights" were used to "undermin[e] black freedom").

Most of the available evidence of the difficult transition from slave to free labor comes from reports

by officers of the Freedmen's Bureau. These officers were stationed throughout the South and were charged with "assisting at the birth of a free labor society." *Reconstruction*, 142. The reports from these officers reveal patterns of retaliation by landowners against former slaves who sought to exercise their right not to contract, who sought payment under contracts, and who reported contract violations to authorities.

In some instances, former slave owners retaliated with physical abuse when the freedmen refused to enter contracts. In North Carolina, for example, a former slaveholder "hired his people for the season" and "claimed that they consented willingly." The ex-slaves told a different story: "when one of them demurred at the offer, his son James flew at him and cuffed and kicked him" and the others remained because "they were actually afraid to try to get away." W.E.B. Du Bois, *Black Reconstruction in America, 1860-1880*, at 138 (1935). *See also* Schurz Report, at 103.

One Freedmen's Bureau officer in South Carolina reported the story of a freedman who had planted a crop and worked it for his former master. When the crop was ready to harvest, the former master asked the freedman and others who had worked with him to "sign a contract for their lifetime. They . . . refused to sign any such contract and [the former master] drove them away without food or any compensation for their labor." D. Sterling, ed., *The Trouble They Seen: The Story of Reconstruction in the Words of African Americans* 51 (1994) (hereinafter *"The Trouble They Seen"*). Another group of South Carolina freedmen wrote a letter to the Bureau explaining, "We then contracted with our former owners for a part of the

crop last year, and at the close of the year we were driven off without anything or any settlement for our year's work because we would not contract with them for the present year." *Id.* at p. 53.

In a September 5, 1865 letter to the editor of the paper *The Liberator*, a group of black Virginians explained why something more than a proclamation of emancipation was necessary to secure the legal rights of the freedmen, mentioning in particular that "there are a number of cases in which a faithful performance by colored men of the labor contracted for has been met by a contemptuous refusal of the stipulated compensation." *The Trouble They Seen*, at 63. *See also* Schurz Report, at 73 ("they labor for the smallest pittance and plainest food, and are too often driven off deprived of the small compensation they labored for."); Reports of Asst. Comm. of the Freedmen's Bureau, 1865-66, S. Exec. Doc. No. 27, 23, 39th Cong., 1st Sess. (1866) ("Besides those cases specified in the report, where freedmen have been driven away by their employers without pay for labor done, a report has been received from one of the agents on the coast, giving a list of seven planters who have thus defrauded their employes [*sic*] out of pay to the amount of over seventeen hundred dollars.").

Some of the reports describe former slaves being threatened with violent reprisal if they dared to leave employers, even in the face of breach of contract by the employer. For example, one freedman who did flee his plantation for Atlanta explained:

> The gentleman I was working with, he wanted me to work for nothing. I had made thirty bags of cotton and he promised

> me half. I went to him after I made the crop and asked for some pay to support my family. He said I should stay and work for nothing. He said if I undertook to leave he would Ku-Klux me.

The Trouble They Seen, at 386-87. The Congressional Joint Committee on Reconstruction heard testimony about an organization known as the "black cavalry," which forcibly returned freedmen who had left their original masters to look for other employment. Report on Reconstruction, pt. iii, 145. *See also* Schurz Rep. at 19; *Historical Context of the Fourteenth Amendment*, at 408; *Reconstruction*, at 121; Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 277 (1979).

Violent reprisals also followed efforts to report contract violations to authorities. A Louisiana Freedmen's Bureau chief told the story of a large number of freedmen who went to work on a plantation where they were promised rations and a salary. When the salary was not paid, and the rations charged out of the promised monthly pay, some of the freedmen went to complain to the Bureau. They were followed by one of the white employees from the plantation, arrested, and held in prison for weeks or months. *The Trouble They Seen*, at 73-74.[2]

---

[2] This kind of conduct continued even after passage of the 1866 law, and Congress continued to receive reports of terrible reprisals against freedmen seeking to assert their contractual rights. The story told by freedman Hiram Smith in testimony to Congress is a particularly stark example of retaliation for the attempt to exercise contractual rights. "My name is Hiram Smith. I live on Joe Williams' place. I asked Mr. Williams to pay me what he owed me on my cotton; also $75 he had taken

As these stories suggest, violence often erupted at the end of a working season, when freedmen would seek payment for the work they had done under the terms of the contracts they entered with their former masters or other white landowners. Sometimes whites retaliated against the freedmen simply for asserting their contractual rights. Other times, the violence followed former slaves' efforts to report the misconduct to the Freedmen's Bureau. One study found that "[l]aborers deluged the Bureau with grievances asserting they received too little or no compensation whatsoever from their employers." *A Spirit of Lawlessness*, at 223. In those instances in which a Freedmen's Bureau court actually heard a complaint of non-payment, "retaliation was too often the result. Oliver, a Montgomery County freedman, was killed for bringing his employer before the Bureau, while an Anderson County black man, Henry Jones, was waylaid and murdered by his boss because Jones sued him for seven dollars." *Id.*

When the federal legislature determined to guarantee the rights of citizenship to the ex-slaves and to curb the abuse that the freedmen faced in the wake of emancipation, the reports of retaliatory misconduct described here formed an important part of the conduct congress sought to make unlawful.

---

from me. He jumped on me and beat me so badly I fear I cannot live. He made me crawl on my knees and call [him] my God, my master, the God of all power, all because I had asked him for a settlement." S. Rep. No. 693, 46th Cong., 2nd Sess. (1880). Another man described his interactions with freedman in Louisiana: "I asked several of them, "Do you not live well?" They told me, "No, the white men take all we make and if we say anything about our rights they beat us." *Id.*

III. The Right to Enforce a Contract Includes a Right Not to be Retaliated Against for Asserting Rights Under the Contract

The 39th Congress passed the Civil Rights Act of 1866 to enforce the Thirteenth Amendment and to eliminate the "badges of slavery" that remained in local law and custom even after the formal prohibition of slavery. This broad civil rights law was part of a series of legislative enactments that included the creation of the Freedmen's Bureau as a short-term solution to the pervasive problems faced by the ex-slaves. The Civil Rights Act aimed at a longer-term solution, guaranteeing to the ex-slaves "the great fundamental rights" of citizenship. Cong. Globe, 39th Cong, 1st Sess. 474 (1866).

The best evidence of what the 39th Congress intended in the Civil Rights Act's guarantee of an equal right to "make and enforce contracts" is the evidence offered in Part II, *supra*. The reports detailed there offer some sense of the evils the legislature sought to address. There was very little mention in the congressional debates about this specific provision, and the words themselves provide only limited clarification. Given the available information, the right to "make and enforce contracts" is appropriately understood to include protection against retaliation for seeking to assert contract rights.

Amici for CBOCS argue that the absence of a specific anti-retaliation provision in the text of the 1866 statute suggests the legislature did not intend to prohibit retaliatory conduct. *See* Brief Amicus Curiae for the Chamber of Commerce of the United States of America in Support of Petitioner at 8; see

also J.A. 160 (Easterbrook, C.J. dissenting) (asserting that Section 1981 predated "anti-retaliation norms"). This argument inappropriately applies modern legislative drafting standards to a statute enacted more than 140 years ago.

The Civil Rights Act of 1866 was passed as a part of a corpus of legislative enactments that includes not only other federal statutes, but also the Thirteenth and Fourteenth Amendments to the Constitution. *See The Politics of Judicial Interpretation,* at 13. The 1866 law does not include specific prohibitions, but instead catalogs what Sen. Lyman Trumbull described, in introducing the bill to the Senate, as a collection of "great fundamental rights." Cong. Globe, 39th Cong. 1st Sess. 474 (1866). What the 39th Congress sought to do with this law was to include protection for those rights widely viewed as basic, fundamental civil rights necessary for the constitutional guarantees of life, liberty and the pursuit of happiness. In doing so, the legislature was "fully aware of the breadth of the measure it had approved." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968). The "broad language" that characterizes this law, *id.*, at 427, is quite unlike the more specific and technical prohibitions contained in statutes enacted in the past half century.[3] *See, e.g.,*

---

[3] The 1991 amendments to the statute only make clearer the broad protections of the law. 42 U.S.C. § 1981(b) now defines "make and enforce contracts" to "include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The right not to be retaliated against for seeking to enforce the terms of a contract is precisely the kind of benefit of the contractual relationship that the freedmen lacked and that Congress sought to provide in 1866. The 1991 legislature, in responding to the view expressed in *Patterson* v.

Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 579-90 (1989).

The breadth of the statutory language cannot reasonably be interpreted as a limitation on its scope. The legislature was well aware in 1866 of the risks that retaliation posed to any meaningful contract rights. As detailed in Part II, Congress confronted considerable evidence that the freedmen faced retaliation for their efforts to enter and assert rights under labor contracts. As Senator Trumbull declared, "There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." Cong. Globe, 39th Cong., 1st Sess. 474. Protection from the kinds of reprisals suffered by freedmen who asserted their contract rights was and is a fundamental tool for ensuring that those contract rights are more than simply abstract principles.

The relationship between protection from retaliation and the effective enforcement of rights has been consistently recognized by this Court as well. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court permitted a claim for retaliation under 42 U.S.C. § 1982, which had also originally been enacted as part of the Civil Rights Act of 1866,

---

McLean Credit Union, 491 U.S. 164 (1989), merely reaffirmed the strong protections the original Congress had authorized by providing further definition for the broad right to "make and enforce contracts." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

because it understood that perpetuation of racial discrimination would be aided by retaliatory conduct. 396 U.S. at 234-35. That reality has not changed, and it is no different in the context of the rights protected by § 1981 than those protected by § 1982. Indeed, for almost forty years, this Court's interpretation of § 1982 has been widely understood as settling the question of retaliation's place in the Civil Rights Act of 1866 and its modern iterations. *See, e.g., Skinner* v. *Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988); *Choudhury* v. *Polytechnic Inst. of New York*, 735 F.2d 38, 43 (2d Cir. 1984); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Facaca* v. *Clements*, 506 F.2d 956 (5th Cir. 1975).

Other decisions, too, have drawn the connection between protection against retaliation and the right to "enforce" a contract. As Justice Thomas recognized in his dissenting opinion in *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 189 (2005), a claim for retaliation is an "enforcement mechanism"— "a claim that aids in enforcing another separate and distinct right." And these enforcement rights begin before formal legal proceedings have commenced. This Court in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) expressly recognized as much, when it noted that the right to enforce contracts includes a right against interference with efforts to seek compliance with contract terms, either formally in court, or through other informal mechanisms (in *Patterson*, through the union grievance process, or here, through a complaint directly to the employer). *Id.* at 177.

The connections between retaliation and enforcement that are evident today were just as

apparent to the legislature in the nineteenth century. If a white plantation owner was permitted to retaliate against a former slave for seeking to enforce the terms of their contractual agreement, he would be interfering with the former slave's right to enforce the contract. The violence that such reprisals took in the 1860s finds its modern parallel in the kind of retaliatory firing faced by Hedrick Humphries today. Humphries sought to enforce the terms of his employment contract – including his right to be free from discriminatory treatment – and for these efforts he lost his job. The harm is not the physical assault suffered by the freedmen during Reconstruction, but the lost opportunity that flowed from Humphries' effort to enforce his employment contract on the same terms available to every citizen. That is precisely the type of opportunity that the 39th Congress aimed to protect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Charles J. Ogletree, Jr.
THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE
125 Mount Auburn Street
Third Floor
Cambridge, MA 02138
(617) 495-8285

Melissa Hart
Counsel of Record
UNIVERSITY OF COLORADO LAW SCHOOL
UCB 401
Boulder, CO 80309
(303) 735-6344

Counsel for *Amici* Historians

January 3, 2008

APPENDIX A

In addition to the historians named in the caption, the following scholars have signed on to this brief. These scholars are legal historians and others whose work has focused on American legal history, race relations, the Civil War and Reconstruction and civil rights.

Richard L. Aynes, John F. Seiberling Chair of Constitutional Law, University of Akron School of Law

H. Robert Baker, Assistant Professor of History, Georgia State University

Edward J. Balleisen, Associate Professor of History, Duke University

Dale Baum, Associate Professor of History, Texas A & M University

R. Ben Brown, Legal Studies Program, University of California at Berkeley

Robert Castro, Assistant Professor, California State University, Fullerton

Jane Dailey, Associate Professor of American History, University of Chicago

Elizabeth Dale, Associate Professor of History, University of Florida

James W. Fox Jr., Professor of Law, Stetson University College of Law

Eric Freedman, Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra University School of Law

Damon Freeman, Assistant Professor, University of Pennsylvania School of Social Policy and Practice

Annette Gordon-Reed, Professor of Law, New York Law School

Michael Green, The College of Southern Nevada

Ariela J. Gross, John B. & Alice R. Sharp Professor of Law and History, Gould School of Law, University of Southern California

Rebecca Hall, Visiting Professor of Law, S.J. Quinney College of Law, University of Utah

Samuel B. Hoff, Law Studies Director, College of Humanities and Social Sciences, Delaware State University

Peter Charles Hoffer, Distinguished Research Professor, University of Georgia

Kurt A. Hohenstein, Assistant Professor of History, Winona State University

J. Gordon Hylton, Professor of Law, Marquette University

Harold M. Hyman, William P. Hobby Professor of History Emeritus, Rice University

Maurice Jackson, Assistant Professor, Department of History, Georgetown University

Edward J. Jocque, Jr., Visiting Professor of History, Michigan State University

Sandra Jowers-Barber, Assistant Professor, University of the District of Columbia

Erin Rahne Kidwell, Adjunct Professor and Scholar-in-Residence, Georgetown Law School

Felicia Kornbluh, Assistant Professor of History, Duke University

Ethan J. Kytle, Assistant Professor, Department of History, California State University, Fresno

Jason S. Lantzer, Department of History, Indiana University, Purdue University, Indianapolis

Jonathan Lurie, Professor of History, Rutgers University

Kurt X. Metzmeier, Associate Professor of Legal Bibliography, Louis D. Brandeis School of Law, University of Louisville

Julie Novkov, Associate Professor of Political Science and Women's Studies, University at Albany, SUNY

Michael J. Pfeifer, Associate Professor, John Jay College of Criminal Justice, City University of New York

Andrew K. Sandoval-Strausz, Assistant Professor, Department of History, University of New Mexico

Judith Kelleher Schafer, Professor of History and Law, Tulane University

Gustav L. Seligmann, Associate Professor of History, University of North Texas

Stephen M. Sheppard, William H. Enfield Professor of Law, University of Arkansas School of Law

Manisha Sinha, Associate Professor, University of Massachusetts, Amherst

Bradley Skelcher, Dean, College of Arts, Humanities and Social Sciences, Delaware State University

Michael Stein, Professor of Law, William and Mary School of Law

Robert Strassfeld, Professor of Law, Case Western Reserve University School of Law

Barbara Terzian, Chair of the Department of History, Ohio Wesleyan University

(15)

No. 06-1431 1-3-08

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND SUPPORTING RESPONDENT

MICHAEL FOREMAN
MEGAN MORAN-GATES
ANDREA LOVELESS
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

PAUL R.Q. WOLFSON
Counsel of Record
ANNE HARKAVY
JULIANA MIRABILIO
SUSAN S. FRIEDMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. SECTION 1981'S BROAD PROHIBITION AGAINST RACIAL DISCRIMINATION IN ALL ASPECTS OF THE CONTRACTUAL RELATIONSHIP INCLUDES PROTECTION AGAINST RETALIATION 6

A. By Its Own Terms, Section 1981 Protects Against Retaliation 7

1. The plain language of the statute supports the conclusion that Section 1981 protects against retaliation 7

2. The legislative history further demonstrates that Section 1981 protects against retaliation 9

3. The Court's prior decisions interpreting Section 1981 do not undercut the conclusion that it protects against retaliation 11

B. The Court's Decisions In *Sullivan* And *Jackson* Further Bolster The Conclusion That Section 1981 Protects Against Retaliation 13

TABLE OF CONTENTS—Continued

Page

II. THE COURT HAS REPEATEDLY REJECTED THE ARGUMENT THAT THE PROTECTIONS AFFORDED BY SECTION 1981 HAVE BEEN SUPPLANTED BY TITLE VII 19

A. Notwithstanding Any Overlap With Title VII, Section 1981 Provides An Independent Avenue Of Relief Against Retaliation In The Employment Context 19

B. Petitioner's Argument Ignores The Fact That Employees Currently May File Discrimination Suits Under Section 1981 Without First Seeking Conciliation Under Title VII 24

III. A REFUSAL TO RECOGNIZE RETALIATION CLAIMS UNDER SECTION 1981 WILL HAVE ADVERSE IMPLICATIONS FAR BEYOND THE EMPLOYMENT CONTEXT 25

IV. THE COURT SHOULD CONTINUE TO INTERPRET SECTION 1981 BROADLY AND IN A MANNER CONSISTENT WITH OUR NATIONAL GOAL OF ERADICATING RACIAL DISCRIMINATION 28

CONCLUSION 30

APPENDIX: Leadership Conference on Civil Rights Participating Organizations, 2007-2008 ..... 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Aleman v. *Chugach Support Services, Inc.*, 485 F.3d 206 (4th Cir. 2007) 26

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 4, 19, 20, 21

Andrews v. *Lakeshore Rehabilitation Hospital*, 140 F.3d 1405 (11th Cir. 1998) 9

Ash v. *Tyson Foods, Inc.*, 546 U.S. 454 (2006) 24

Berry v. *Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) 27

Burlington Northern & Santa Fe Railway Co. v. *White*, 126 S. Ct. 2405 (2006) 12, 13, 27

Caldwell v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971) 20

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 14

City of Memphis v. *Greene*, 451 U.S. 100 (1981) 14

Cort v. *Ash*, 422 U.S. 66 (1975) 14

Domino's Pizza, Inc. v. *McDonald*, 546 U.S. 470 (2006) 11, 19

Evans v. *City of Browning, Montana*, 953 F.2d 1386 (9th Cir. 1992) 26

Fiedler v. *Marmusco Christian School*, 631 F.2d 1144 (4th Cir. 1980) 27

Foley v. *University of Houston System*, 355 F.3d 333 (5th Cir. 2003) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Hawkins v. *1115 Legal Service Care*, 163 F.3d 684 (2d Cir. 1998) 12

Jackson v. *Birmingham Board of Education*, 544 U.S. 167 (2005) 3, 4, 8, 14, 17, 18

Johnson v. *California*, 545 U.S. 162 (2005) 28

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ..... *passim*

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) 15, 29

Lizardo v. *Denny's, Inc.*, 270 F.3d 94 (2d Cir. 2001) 26

McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) 6, 28, 29

Moor v. *County of Alameda*, 411 U.S. 693 (1973) 15

NAACP v. *FPC*, 425 U.S. 662 (1976) 28

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 9, 23, 26, 28

Pinchback v. *Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990) 26

Rivers v. *Roadway Express, Inc.*, 511 U.S. 298 (1994) 5, 6, 10, 12, 23, 26

Runyon v. *McCrary*, 427 U.S. 160 (1976) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 3, 13, 14, 17, 18, 29

Tillman v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) 3, 15, 26, 29

Warth v. *Seldin*, 422 U.S. 490 (1975) 15

Webster v. *Fulton County, Georgia*, 283 F.3d 1254 (11th Cir. 2002) 26

Young v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971) 20

STATUTES

42 U.S.C.
§ 1981 ..... 2, 3, 7, 16, 18, 20
§ 1981a 24
§ 1982 ..... 3, 13, 14, 16
§ 1988 15
§ 2000e 23
§ 2000e-3 ..... 4, 19
§ 2000e-5 23
§ 2000e-5g 24
§ 2000e-16b 24

Civil Rights Act of 1866, 14 Stat. 27 ..... 15, 20

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 2, 3, 9, 12

Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, *as amended*, 20 U.S.C. §§ 1681 *et seq.* 4

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE MATERIALS

H.R. Rep. No. 92-238 (1971) 20

H.R. Rep. No. 102-40 (1991) 10

S. Rep. No. 92-415 (1971) 20

S. Rep. No. 101-315 (1990) 11

137 Cong. Rec. 29,066 (1991) 10

137 Cong. Rec. 30,695 (1991) 10

OTHER AUTHORITIES

Aston, Adam W., Note, *"Fair and Full Employment": Forty Years of Unfulfilled Promises*, 15 Wash. U. J.L. & Pol'y 285 (2004) 24

Tarantolo, Danielle, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 Yale L.J. 170 (2006) 25

INTEREST OF AMICI CURIAE

The Leadership Conference on Civil Rights (LCCR) is a coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States.[1] Founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council—LCCR is the nation's oldest, largest, and most diverse civil and human rights coalition. Its member organizations represent men and women of all races and ethnicities.[2]

Among LCCR's members are organizations, including, *inter alia*, the American Civil Liberties Union, AFL-CIO, Anti-Defamation League, Asian American Justice Center, Lawyers' Committee for Civil Rights Under Law, Legal Momentum, Mexican American Legal Defense and Educational Fund, NAACP Legal Defense and Educational Fund, Inc., National Partnership for Women & Families, National Women's Law Center, and Women Employed, that have been at the forefront of advocacy before the courts to ensure equal employment opportunity for men and women from diverse

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

[2] The appendix to this brief contains a complete list of LCCR member organizations.

communities, and to secure essential protections against workplace discrimination.

LCCR promotes effective civil rights legislation and policy as well as the strong enforcement of existing statutory and constitutional protections. Of particular relevance here, LCCR was actively involved in the development and passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, including Congress's efforts to amend 42 U.S.C. § 1981 to clarify the statute's intended broad scope. Its members are dedicated to preserving the interest of individuals in raising issues of unlawful discrimination and the interest of society in having those issues brought to light.

The Leadership Conference on Civil Rights Education Fund (LCCREF) is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public understanding of issues of prejudice.

LCCR and LCCREF strongly support respondent's position that Section 1981 affords redress for retaliation for complaints about unlawful race discrimination. Based on their long experience in supporting and monitoring the enforcement of federal anti-discrimination mandates, amici's unequivocal judgment is that a remedy for reprisal discrimination is indispensable to the efficient, effective enforcement of Section 1981, and of federal anti-discrimination laws generally.

SUMMARY OF ARGUMENT

One of the nation's oldest civil rights statutes, Section 1981, 42 U.S.C. § 1981(a), ensures that persons of all races can enjoy equal contractual rights. To achieve this fundamental goal, Section 1981's scope has always been deliberately broad. Indeed, in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress made clear that Section 1981 encompasses no less than "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Thus, by its own terms, Section 1981 not only guarantees persons the right to enter into contractual relationships free of race discrimination, but also guarantees persons the right to enjoy all the corresponding benefits of those contractual relationships. Accordingly, where, as here, an employee is penalized for attempting to seek redress for an employer's alleged racial discrimination, he is, by definition, deprived of the benefits of the contractual relationship in violation of his rights under Section 1981.

The Court's decisions in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), support this reading of Section 1981. In *Sullivan*, while not explicitly using the term "retaliation," the Court nonetheless permitted the plaintiff to bring a claim under Section 1981's sister statute, 42 U.S.C. § 1982, based on retaliatory acts. *See* 396 U.S. at 236-237. Since its decision in *Sullivan*, the Court has repeatedly emphasized "the historical interrelationship" between Sections 1981 and 1982, *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973), cementing the conclu-

sion that the statutes are meant to be construed *in pari materia*. Likewise, in *Jackson*, the Court relied on *Sullivan* in holding that the implied private right of action under Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, *as amended*, 20 U.S.C. §§ 1681 *et seq.*, (Title IX), necessarily encompasses claims of retaliation for complaints about sex discrimination, even though Title IX does not mention retaliation expressly. The *Jackson* Court emphasized that "broadly written general prohibition[s] on discrimination" are meant to be interpreted in just that fashion—broadly. 544 U.S. at 175. *Jackson*, like *Sullivan*, thus supports the conclusion that Section 1981 protects against retaliation with respect to the making and enforcing of contracts.

Construing Section 1981 to provide protection against retaliation does not undercut the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). As the Court has made clear, Title VII's administrative apparatus was intended to supplement, rather than supplant, Section 1981. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Although the remedies available under Section 1981 and Title VII are "related" and "directed to most of the same ends," they are nonetheless "separate, distinct, and independent." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). That an employee might choose to file suit under Section 1981 directly, rather than invoke the administrative machinery of Title VII, is simply the "natural" consequence of the choice Congress made by conferring "independent administrative and judicial remedies." *Id.* Because the Court has recognized that this "choice is a valuable one," *id.*, it should not be taken away based on an unduly restrictive reading of Section 1981 (which, by its

own terms, is a broadly worded prohibition against race discrimination in the making and enforcing of contracts).

In addition to ignoring Congress's conscious choice—recognized by this Court—to have overlapping remedial schemes between Section 1981 and Title VII, petitioner also fails to acknowledge that Section 1981 reaches far beyond the employment context. *See Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 303-304 (1994) (observing that Section 1981's protections extend to "*all* contracts" and "all aspects of the contractual relationship"). Thus, a ruling that retaliation claims are not cognizable under Section 1981 could undermine civil rights enforcement in many settings, including those where Title VII would be unavailable as an avenue for relief. Such a result would be inconsistent with the broad remedial purposes—and the correspondingly broad remedial language—of Section 1981.

Section 1981's broad scope has been memorialized in numerous decisions and now constitutes "an important part of the fabric of our law." *Runyon* v. *McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring). Applying petitioner's narrow construction of Section 1981 would be wholly inconsistent with Congress's intent to ensure equal rights in contracting for all. To remain true to the plain text of Section 1981, its historical underpinnings, and the significant precedents interpreting this foundational statute, the Court should confirm that Section 1981 includes protection against retaliation in the making and enforcing of contracts.

ARGUMENT

I. SECTION 1981'S BROAD PROHIBITION AGAINST RACIAL DISCRIMINATION IN ALL ASPECTS OF THE CONTRACTUAL RELATIONSHIP INCLUDES PROTECTION AGAINST RETALIATION

Section 1981 is one of our nation's oldest civil rights statutes. It is no exaggeration to say that the passage of Section 1981 was integral to the emergence of the very concept of civil rights under law in the United States. As such, it plays an especially important role in the legal protection of civil rights in this country.

Derived from Section 1 of the Civil Rights Act of 1866, Section 1981's substantive provisions were passed in direct response to the "Black Codes" enacted in southern States that sought to deprive newly emancipated slaves of civil and economic rights, and thereby "circumvent the requirements of the Thirteenth Amendment" and "essentially continue[] a pattern of legal enslavement." JA124. Section 1981's scope is and always has been broad, for it was intended to ensure that persons of all races may enjoy the right of contract that is fundamental to this nation's free enterprise system. Thus, the Court has long interpreted Section 1981 to extend well beyond "the particular and immediate plight of the newly freed Negro slaves," *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976), and has recognized that its protections extend to "*all* contracts" and "all aspects of the contractual relationship," *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 303-304 (1994). As explained below, if Section 1981 is to retain its central role of ensuring that persons of all races enjoy equal contractual rights, then it should be read to prohibit retaliation against the exercise of the very rights that it protects.

A. By Its Own Terms, Section 1981 Protects Against Retaliation

1. The plain language of the statute supports the conclusion that Section 1981 protects against retaliation

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts" without respect to race. 42 U.S.C. § 1981(a). When Congress amended the statute in 1991, the term "make and enforce contracts" was further defined to include "the making, performance, modification, and termination of contracts, and *the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" 42 U.S.C. § 1981(b) (emphasis added). Thus, by its plain terms, Section 1981 does more than proscribe racial discrimination in the opportunity to enter into a contractual relationship; it also guarantees that persons of all races will have the equal right to enjoy the benefits of their contractual relationships, including the right to invoke whatever measures are necessary to ensure that their contractual rights are protected.

Notably, when amending Section 1981 in 1991, Congress chose language that would parallel the statute's existing structure as a broadly worded prohibition, rather than compromising that structure by inserting specific causes of action for post-formation discrimination. The fact that Section 1981 does not use the specific term "retaliation" does not mean that retaliatory acts are not covered. Indeed, although Section 1981 makes no express mention of "discrimination" by contracting parties, 42 U.S.C. § 1981(a)-(b), the Court has long recognized that the statute provides broad protection against racial discrimination. *See, e.g., Runyon* v. *McCrary*, 427 U.S. 160, 168-175 (1976); *Johnson* v.

Railway Express Agency, Inc., 421 U.S. 454, 459-461 (1975). Similarly, although Section 1981 does not expressly refer to "retaliation," it also bars retaliation against those who would seek to enjoy, on an equal basis, the benefits, privileges, terms, and conditions of their contractual relationships. As the Court has previously recognized with respect to discrimination on the basis of sex under Title IX, "[r]etaliation against a person because that person has complained of sex discrimination is *another form of intentional sex discrimination*[.]" *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (emphasis added). This is because, "by definition," retaliation is "an intentional act," *id.* at 173-174, by which "the complainant is being subjected to differential treatment," *id.* at 174. In *Jackson*, the Court explained that such differential treatment constitutes unlawful discrimination "on the basis of sex because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.*

No less is true with respect to retaliation against a person for complaints of race discrimination under Section 1981. An employee who complains to a supervisor or otherwise engages an employer's internal complaint procedures to assert a race discrimination claim is attempting, in the words of the statute, to enforce his or her right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." If that employee is penalized for taking such action, he is denied the equal right to the enjoyment of benefits under the contract in violation of Section 1981. Under petitioner's constricted view of the protections that Section 1981 affords, however, employers could terminate any employee—free of consequence—for attempting to do just that. This result would deter employees from seeking redress through either internal processes

or the EEOC, thereby undermining the very conciliation and other non-litigation alternatives that petitioner claims to support. Pet. Br. 22-26, 39-40. Furthermore, this reading also conflicts with the Court's recognition that Section 1981 covers "wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 177 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Section 1981 could hardly protect employees' equal access to processes (formal or informal) against discrimination if it did not also prohibit retaliation for invoking those very processes.

2. The legislative history further demonstrates that Section 1981 protects against retaliation

The legislative history of the Civil Rights Act of 1991 makes additionally clear that retaliation claims are covered under the statute. Before the Court's ruling in *Patterson*, courts routinely held that Section 1981 encompassed race-based retaliation claims. *See Andrews* v. *Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1410 (11th Cir. 1998) (citing cases). In *Patterson*, however, the Court held that Section 1981, as it was then framed, "d[id] not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." 491 U.S. at 177. Concerned about the likely consequences of *Patterson*'s constricted reading of Section 1981, Congress acted with dispatch. It enacted the 1991 Act, which amended Section 1981 "to embrace all aspects of the contractual relationship, including contract terminations," effectively "enlarg[ing] the category of conduct that is subject to § 1981 liabil-

ity," *Rivers*, 511 U.S. at 303, and making clear that Section 1981 applies broadly to post-formation conduct. By amending Section 1981 promptly after the Court's narrow reading of the same in *Patterson*, Congress clearly signaled that courts should interpret Section 1981's statutory language in accordance with its broad remedial purpose. *See id.* at 306-307.[3]

In discussing the amendment's scope, the House Committee Report stated that it intended Section 1981 "to bar all racial discrimination in contracts," which "would include, but is not limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring." H.R. Rep. No. 102-40, pt. 2, at 37 (1991) (emphasis added). Even more specifically, the House Committee Report states that the 1991 Act was designed to codify Section 1981's retaliation protections to the extent that *Patterson* called them into question. *Id.*, pt. 1, at 92 n.92 (1991) ("In cutting back the scope of the rights to 'make' and 'enforce' contracts *Patterson* also has been interpreted to eliminate retaliation claims that the courts had previously recognized under [S]ection 1981.... *[The new subsection (b)] would restore rights to sue for such retaliatory conduct.*" (citations omitted; emphasis added)). The report issued by the Senate Committee on Labor and Human Resources with respect to the virtually identical 1990 civil rights bill that was passed by Congress, but vetoed by the

---

[3] It bears noting that the 1991 Act, which affirmed Section 1981's broad scope, was passed with significant bipartisan support, demonstrating strong congressional agreement as to the importance of preserving Section 1981's breadth. *See* 137 Cong. Rec. 29,066 (1991) (recording the Senate vote on the 1991 Act as 93-5 in favor of the Act); 137 Cong. Rec. 30,695 (1991) (recording the House vote as 381-38 in favor of the Act).

President, further confirms that Congress intended the amendment be given a broad reading: "The list set forth in the subsection (b) added by the Act is intended to be *illustrative* rather than exhaustive." S. Rep. No. 101-315, at 58 (1990) (emphasis added). Taken together, these statements demonstrate that Congress meant the statute's text to provide comprehensive protection against all interference in the making and enforcing of contracts—including claims of retaliation. *See Foley* v. *University of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) ("It seems unreasonable to believe that in enacting the Civil Rights Act of 1991, Congress intended to make the scope of the new § 1981(b) narrower than that of the old § 1981 as it had been interpreted by this Court and many other federal courts before *Patterson.*").

3. The Court's prior decisions interpreting Section 1981 do not undercut the conclusion that it protects against retaliation

The Court's recent cases involving Section 1981, relied on by petitioner, do not suggest a different result.

First, in *Domino's Pizza* v. *McDonald*, 546 U.S. 470, 472 (2006), the Court examined "whether a plaintiff who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship" may bring suit under Section 1981. The Court answered this question in the negative, finding that "the plain text of the statute" requires "we hold that a plaintiff cannot state a claim under Section 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce.' " *Id.* at 479-480. But in cases such as the present one, the respondent *did* have a contractual relationship with his

employer, and by complaining against racial discrimination, he was doing nothing more than attempting to secure his equal rights under that contractual relationship. Thus, "the retaliation [was] in response to the claimant's assertion of rights that were protected by § 1981." *Hawkins* v. *1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998).

Second, in *Rivers* v. *Roadway Express, Inc.*, the Court considered whether the 1991 Act should have retroactive application to Section 1981 cases that arose before its enactment. 511 U.S. at 303. Again, the Court answered in the negative, concluding that "the text of the Act does not support the argument that § 101 of the 1991 Act was intended to 'restore' prior understandings of § 1981 *as to cases arising before the 1991 Act's passage*."[4] *Id.* at 308 (emphasis added). That the 1991 Act was not meant to "restore prior understandings of § 1981" as to cases arising before its enactment, however, says nothing about the proper treatment of cases arising afterwards. Given the Court's acknowledgment that the 1991 Act "enlarged the category of conduct that is subject to § 1981 liability," *id.* at 303, there is no reason to read *Rivers* as precluding a finding that retaliation claims are cognizable under Section 1981.

Finally, petitioner's reliance on *Burlington N. & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405 (2006), is misplaced. Pet. Br. 11-13. The distinction drawn in *Burlington* between Title VII's anti-discrimination and anti-retaliation provisions served merely to clarify that, unlike its anti-discrimination provision, Title VII's anti-

---

[4] Section 101 of the Civil Rights Act of 1991 added the new subsection (b), defining the term "make and enforce contracts." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072.

retaliation provision encompasses harms outside the employment context. Specifically, explained the Court, "[a] provision limited to employment-related actions would not deter the many forms that effective retaliation can take" and "would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'" 126 S. Ct. at 2412 (citation omitted). *Burlington* thus stands for the proposition that broad-based protection against retaliation is crucial to protecting the substantive anti-discrimination right. That proposition supports, rather than undermines, the conclusion that Section 1981 provides protection against retaliation.

Congress enacted Section 1981 in broad terms to guarantee that persons of all races have an equal right to make and enjoy the benefits of contracts. In a free enterprise system such as ours in which the contract is the key economic engine, Section 1981 was a crucial step towards ensuring that persons of all races have equal opportunities to seek and make use of the benefits of contracting. The hollow interpretation of the statute that petitioner envisions and urges upon this Court is simply not the one Congress created in passing Section 1981.

B. The Court's Decisions In *Sullivan* And *Jackson* Further Bolster The Conclusion That Section 1981 Protects Against Retaliation

Even if the statute were unclear on this issue—and it is not—the Court's decisions in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson* resolve any doubt as to whether Section 1981 reaches retaliation. In *Sullivan*, the Court held that a white homeowner could bring a claim under 42 U.S.C. § 1982

when a community nonprofit corporation refused to approve his proposed assignment of a membership interest in the corporation's recreation facilities to an African-American, and expelled him from the corporation when he protested its action.[5] 396 U.S. at 236-237. While not explicitly using the term "retaliation," the Court recognized that retaliatory acts comprised the heart of plaintiff's claim and allowed him to proceed on that basis: "If [plaintiff's expulsion from the corporation] . . . can be imposed, then [plaintiff] is punished for trying to vindicate the rights of minorities protected by [§] 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* at 237. Significantly, in ruling as it did, the Court observed that "[a] narrow construction of the language of [§] 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by [§] 1 of the Civil Rights Act of 1866," from which *both* Section 1982 and Section 1981 derive.[6] *See id.*

---

[5] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

[6] Petitioner erroneously suggests that *Sullivan* is no longer good law in light of norms of statutory interpretation set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975). Pet. Br. 35. The Court, however, recently reaffirmed *Sullivan*'s core holding in *Jackson*. 544 U.S. at 176 & n.1 ("[*Sullivan*] plainly held that the white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.' " (citation omitted)). The Court has reaffirmed other aspects of *Sullivan* as well. *See City of Memphis* v. *Greene*, 451 U.S. 100, 121 (1981) (affirming *Sullivan*'s holding that the term "lease" in Section 1982 includes "an assignable membership share in recreational facilities"); *Cannon* v. *University of Chi.*, 441 U.S.

Since its decision in *Sullivan*, the Court has repeatedly emphasized "the historical interrelationship" between Sections 1981 and 1982.[7] This interrelationship is evident from the text of Section 1 of the Civil Rights Act of 1866, which stated in pertinent part that "citizens, of every race and color ... *shall have the same right*, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens[.]" 14 Stat. 27 (emphasis added). The opera-

---

677, 699 n.22 (1979) (affirming *Sullivan*'s holding finding a private cause of action for retaliation under Section 1982); *Runyon*, 427 U.S. at 173 (affirming *Sullivan*'s holding that Sections 1981 and 1982 reach private conduct); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) (affirming *Sullivan*'s holding that third parties have standing to assert the rights of others under Section 1982); *Moor* v. *County of Alameda*, 411 U.S. 693, 703 (1973) (upholding *Sullivan*'s construction of 42 U.S.C. § 1988); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 435, 438 (1973) (holding that property-linked membership preferences in a swimming pool association are covered by Section 1982). There is thus no basis for petitioner's assertion that *Sullivan* is no longer good law.

[7] *See Tillman*, 410 U.S. at 440 ("[W]e see no reason to construe these sections differently when applied, on these facts, to the claim of [defendant] that it is a private club."); *see also Runyon*, 427 U.S. at 170-171 (recognizing the Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that Section 1982 "prohibits private racial discrimination in the sale or rental of real or personal property" applies equally to Section 1981, as "confirmed" by *Tillman* and *Johnson*); *id.* at 187 (Powell, J., concurring) (agreeing with the Court that the "considered holdings" of *Tillman*, *Sullivan*, and *Jones* "with respect to the purpose and meaning of § 1982 necessarily apply to both statutes in view of their common derivation").

tive language of Section 1 was that persons of all races "shall have the same right"—thus barring racial discrimination. The rest of Section 1 explicated the *scope* of that prohibition against racial discrimination, and extended it to matters such as contracting and ownership of real property. *See Runyon*, 427 U.S. at 170-171. Later, Section 1 was broken up by the codifiers into two separate sections of the Revised Statutes, R.S. 1977 and 1978 (now better known as 42 U.S.C. §§ 1981 and 1982), which address discrimination in the spheres of contracting and property separately; but the *substance* of the prohibition against discrimination in those two statutes remained parallel. *See id.*

Sections 1981 and 1982 are obviously meant to be construed *in pari materia*, for they have been, in a manner of speaking, conjoined twins since their birth. Because there is no doubt that *Sullivan* (which recognizes that Section 1982 protects against retaliation) remains good law, and because Section 1981 and Section 1982 share the same historical and statutory underpinnings, there is every reason to conclude that Section 1981 similarly protects against retaliation with respect to the making and enforcing of contracts.[8]

---

[8] Significantly, in its recent brief on behalf of respondent in *Gomez-Perez* v. *Potter*, cert. granted, No. 06-1321, the Solicitor General similarly acknowledged *Sullivan*'s "particular salience" with respect to the interpretation of Section 1981. 06-1321 Resp. Br. 21 n.3. Specifically, after citing *Sullivan* for the proposition that Section 1982 provides a cause of action for " 'retaliation against those who advocate the rights of [protected] groups,' " the Solicitor General made express note of the Court's tendency to "construe[] Section 1981 and 1982 in parallel," given "their common history." *Id.* (citation omitted).

In *Jackson*, the Court relied heavily on *Sullivan* to support its conclusion that Title IX's implied private right of action encompasses claims of retaliation for complaints about sex discrimination, notwithstanding the statute's failure to mention retaliation expressly. Because Title IX was enacted three years after *Sullivan* was decided, the *Jackson* Court presumed Congress was " 'thoroughly familiar' " with the decision in *Sullivan* and " 'expected its enactment [of Title IX] to be interpreted in conformity with [it].' " *Jackson*, 544 U.S. at 176 (citations omitted; alterations in original). To this end, the Court explained that in *Sullivan*, it had "interpreted a general prohibition on racial discrimination *to cover retaliation* against those who advocate the rights of groups protected by that prohibition." *Id.* (emphasis added). The Court further emphasized the significance of this protection, noting that "[i]f recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* at 180; *see also Sullivan*, 396 U.S. at 237 (absent a right of protection against retaliation, the underlying discrimination would be perpetuated).

Jackson is particularly instructive because it demonstrates the Court's approach to interpreting broadly worded statutes, such as Section 1981, that address and remedy discrimination. In determining whether to apply a narrow or broad interpretation, the *Jackson* Court distinguished statutes that exhaustively list actionable conduct, such as Title VII, from those that are "broadly written general prohibition[s] on discrimination," like Section 1981. 544 U.S. at 175. The Court determined that general prohibitions should be afforded an expansive interpretation. *Id.* Specifically, when interpreting a broad statute like Section 1981, the Court

concluded that, "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention [retaliation] does not tell us anything about whether it intended that practice to be covered."[9] *Id.* Similarly, when interpreting Section 1981, this Court should not read retaliation out of the statute simply because Congress chose not to list *any* discriminatory practices.[10]

The Court's rationale for recognizing that Title IX bars retaliation (notwithstanding its failure to mention "retaliation" per se) carries equal if not greater weight in the instant matter, given *Jackson's* reliance on *Sullivan* and the Court's longstanding practice of constru-

---

[9] In his dissent in *Jackson*, Justice Thomas submitted "that the text of Title IX does not mention retaliation is significant." 544 U.S. at 189 (Thomas, J., dissenting). Nonetheless, the Court in *Jackson* ruled that Title IX bars retaliation against those who oppose or complain about sex discrimination. The majority's reasoning is even more applicable to Section 1981, which does not expressly refer to either discrimination *or* retaliation, 42 U.S.C. § 1981(a)-(b), but has long been read—consistent with its foundational role in this nation's protections against racial discrimination—to ensure equal rights for persons of all races in any matters within its scope.

[10] As the Court has recognized, reading retaliation out of such a broadly written anti-discrimination statute would advance the very discrimination the statute was designed to combat. *Jackson*, 544 U.S. at 180-181 ("Without protection from retaliation, individuals who witness discrimination would not likely report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied."); *Sullivan*, 396 U.S. at 237 (concluding that the interpretation of Section 1982 to allow an individual's expulsion from a community nonprofit corporation as punishment for "t-ying to vindicate the rights of minorities protected by § 1982 .. would give impetus to the perpetuation of racial restrictions on property").

ing Section 1981 *in pari materia* with Section 1982.[11] Thus, *Jackson*, like *Sullivan*, supports the conclusion that Section 1981 protects against retaliation with respect to the making and enforcing of contracts.

II. THE COURT HAS REPEATEDLY REJECTED THE ARGUMENT THAT THE PROTECTIONS AFFORDED BY SECTION 1981 HAVE BEEN SUPPLANTED BY TITLE VII

A. Notwithstanding Any Overlap With Title VII, Section 1981 Provides An Independent Avenue Of Relief Against Retaliation In The Employment Context

Petitioner's argument that construing Section 1981 to encompass a prohibition against retaliation, at least in the employment context, would interfere with the operation of Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), Pet. Br. 21, is contrary to both clear congressional intent and well-established precedent. As this Court has recognized, in enacting Title VII, Congress deliberately created a statutory scheme that overlaps in both purpose and remedy with Section 1981. Thus, Section 1981 and Title VII provide independent and complementary avenues for relief in certain employment contexts.

Title VII was enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To ensure that

---

[11] If anything, the case for recognizing retaliation here is perhaps even stronger, as respondent himself, rather than a third party, was the victim of racial discrimination and was retaliated against for his subsequent allegations of discrimination. *See Domino's Pizza, Inc.*, 546 U.S. at 479 ("Injured parties 'usually will be the best proponents of their own rights.' " (citation omitted)).

these goals were met, and to ensure that individual employees would not have to attempt to enforce their rights against discrimination unaided against parties with greater resources, Congress created the Equal Employment Opportunity Commission (EEOC) and established procedures whereby the EEOC "would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit [against his employer]." *Id.*

Notwithstanding Title VII's "design as a comprehensive solution for the problem of invidious discrimination in employment," *Johnson*, 421 U.S. at 459, that statute was intended to supplement, not to replace, Section 1981. Legislative history pertaining to Title VII plainly bears out that point. *See* H.R. Rep. No. 92-238, at 19 (1971) (noting the "Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive"); S. Rep. No. 92-415, at 24 (1971) (noting the provisions governing an individual's right to sue under Title VII are not meant "to affect existing rights granted under other laws"). Congress's recognition in 1971—when it reexamined and broadly extended Title VII—that Title VII and Section 1981 are independent, but overlapping, remedies is particularly important because by that time the federal courts had already construed Section 1981 to provide a remedy against retaliation in the employment context independent of Title VII. *See Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971); *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971).

The Court has recognized that "legislative enactments in this area [*i.e.*, employment] have long evinced a general intent to accord parallel or overlapping remedies." *Alexander*, 415 U.S. at 47; *see also id.* at 48-49 ("Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination."). These remedies, "although related, and although directed to most of the same ends," are nonetheless "separate, distinct, and independent." *Johnson*, 421 U.S. at 461.

Thus, petitioner's contention that Congress, in amending Section 1981, "could not have intended to destroy Title VII's specific administrative and procedural mechanisms governing discrimination and retaliation in the employment relationship" misses the point. Pet. Br. 25. Although some employees may choose to file suit immediately under Section 1981 rather than pursue remedies under Title VII, there are many reasons why an employee would invoke the procedures of Title VII whenever they are available instead. That an employee might choose to pursue one avenue for redress rather than another is, as the Court has recognized, simply the "natural" consequence of the choice Congress made by conferring "independent administrative and judicial remedies." *See Johnson*, 421 U.S. at 461. Moreover, "*[t]he choice is a valuable one*" since, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory" while under others, "the reverse may be true."[12] *Id.* (emphasis added).

---

[12] Chief Judge Easterbrook, dissenting from the decision below, suggested that the issue here "is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed

Title VII offers many advantages to aggrieved employees, and so this Court should not presume that individuals who believe they have suffered unlawful retaliation will lightly skip over that remedial scheme and will simply sue under Section 1981. Most significantly, the administrative resources of the EEOC are not available if an aggrieved employee sues directly under Section 1981. These resources are available to the employee without charge or the need to hire an attorney. At the end of the administrative process, the EEOC may even decide to pursue litigation itself against the

---

to file a timely charge under Title VII and engage in conciliation before turning to the court." JA160 (Easterbrook, C.J., dissenting in part). As respondent's brief points out, this is not a case in which plaintiff "slept" on his Title VII rights. Resp. Br. 5-6, 33 n.17; *cf. Johnson*, 421 U.S. at 466. More importantly, however, Chief Judge Easterbrook's assertion that, by recognizing an anti-retaliation rule in Section 1981, the majority "demolishes components of Title VII ... Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court" overlooks Congress's and the Court's longstanding recognition that the two avenues of redress are independent. JA160 (Easterbrook, C.J., dissenting in part). As *Johnson* makes clear, in enacting overlapping legislative schemes, Congress purposefully left the choice whether to litigate under Section 1981 or pursue administrative remedies under Title VII to the aggrieved individual. Thus, that an employee might choose to file suit pursuant to Section 1981 rather than engage in "the more elaborate and time-consuming procedures of Title VII," *Johnson*, 421 U.S. at 466, does not "demolish components" of the latter—rather, it is the natural consequence of Congress's decisions in this area. Even if, as a matter of policy, conciliation and persuasion might generally constitute the more "desirable approach to settlement of [employment] disputes," the Court has recognized that "without a more definite expression in the legislation Congress has enacted," there is no reason "to infer any positive preference for one [remedy] over the other." *Id.* at 461.

employer. 42 U.S.C. § 2000e-5. Further, should the EEOC not bring suit, but instead issue a right-to-sue letter, the federal district court in which a Title VII action may be brought "is empowered to appoint counsel for [the employee], to authorize the commencement of the action without the payment of fees, costs, or security," and to award reinstatement. *See Johnson*, 421 U.S. at 458.

That Section 1981's scope and available remedies extend beyond that of Title VII further evinces Congress's intent to provide two independent avenues of redress. As the Court has observed, "a substantial part of [§ 1981's] sweep does not overlap Title VII." *Rivers*, 511 U.S. at 304 (internal citations omitted). Section 1981, of course, reaches beyond the common-law employment relationship, and even in the employment context, its coverage is broader than that of Title VII, given that Title VII applies only to those employers with 15 or more employees.[13] 42 U.S.C. § 2000e(b); *see also Rivers*, 511 U.S. at 304 n.3; *Patterson*, 491 U.S. at

---

[13] Even if putative plaintiffs who work for employers with fewer than fifteen employees "may have recourse" under applicable state civil rights laws, most states do not in fact have a comparable statutory alternative that protects against retaliation and covers employers with fewer than fifteen employees. Chamber of Commerce Amicus Br. 14-15 & nn.5-6 (pointing to only twenty states with no numerosity requirements, numerosity requirements lower than Title VII's, and/or no prohibition against the application of its anti-retaliation provisions to statutory "employers"). Moreover, there is a profound irony to the argument that Section 1981 should be construed narrowly because of the theoretical availability of state remedies, for an undisputed purpose of Section 1981 was to protect individuals who, because of their race, could not obtain effective recourse in state courts. *See Runyon*, 427 U.S. at 200 (White, J., dissenting).

211 (Brennan, J., dissenting in part); *Johnson*, 421 U.S. at 460. Moreover, some remedies available under Section 1981 are broader than those available under Title VII. *See* 42 U.S.C. §§ 1981a, 2000e-5g(1), 2000e-16b(b) (capping compensatory and punitive damages and limiting accrual of backpay under Title VII).

While petitioner would have the Court brush these differences aside, they are hardly without meaning. Not only do they represent Congress's efforts to provide independent (albeit overlapping) causes of action for the putative plaintiff, but for the significant number of employees not covered by Title VII, Section 1981 may well represent their only available remedy.[14]

B. Petitioner's Argument Ignores The Fact That Employees Currently May File Discrimination Suits Under Section 1981 Without First Seeking Conciliation Under Title VII

Petitioner suggests that, if Section 1981 is read to provide redress against retaliation, then some putative plaintiffs with retaliation claims will eschew their Title VII remedies in favor of Section 1981 claims that will "end up clogging the judicial system," Pet. Br. 39. That alarmist claim is unwarranted.

There is no dispute (nor could there be) that discrimination claims are cognizable under both Title VII and Section 1981. *See Ash* v. *Tyson Foods, Inc.*, 546 U.S. 454 (2006). Although plaintiffs may choose to file

---

[14] *See* Aston, Note, *"Fair and Full Employment": Forty Years of Unfulfilled Promises*, 15 Wash. U. J.L. & Pol'y 285, 311 (2004) (from 1992 to 2001 "between fourteen and twenty-six percent of the workers in private industry work[ed] for a business exempt from Title VII liability").

suit immediately under Section 1981 rather than resort to Title VII's "more elaborate and time-consuming" administrative scheme, the relevant evidence suggests that, by and large, plaintiffs continue to pursue their remedies with the EEOC. Indeed, "[f]rom 1998 to 2003 ... of the 19% of all employment discrimination cases that featured a § 1981 claim, only 0.7% involved a § 1981 claim standing alone."[15] Further, "the EEOC has successfully conciliated over 4,000 disputes stemming from race-based charges" and "[a]pproximately 25,000 more claims were resolved in other cooperative fashions." Pet. Br. 39. The small numbers of plaintiffs pursuing Section 1981 claims in the absence of a companion statute, combined with the EEOC's proven experience in conciliating race-based charges, strongly suggests that aggrieved individuals are unlikely to clog the courts by pursuing retaliation claims under Section 1981, rather than invoking the administrative machinery of Title VII when that avenue is available to them.

III. A Refusal To Recognize Retaliation Claims Under Section 1981 Will Have Adverse Implications Far Beyond The Employment Context

In arguing that this Court should not read Section 1981 to interfere with Title VII, petitioner understandably trains its argument primarily on the employment context. Section 1981 reaches beyond the employment relationship, however, and a failure to recognize retaliation claims under Section 1981 will undermine the utility of Section 1981 and other antidiscrimination laws more generally.

---

[15] Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 Yale L.J. 170, 190 (2006).

By its express terms, Section 1981 covers *all* contracts, not just those relating to employment. *Rivers*, 511 U.S. at 304; *see also Patterson*, 491 U.S. at 210 (Brennan, J., dissenting in part) ("Section 1981 is a statute of general application, extending not just to employment contracts, but to *all* contracts."); *Aleman* v. *Chugach Support Servs., Inc.*, 485 F.3d 206, 211 (4th Cir. 2007) ("Section 1981's prohibition on racial discrimination in the making and enforcement of contracts has long been applied to relationships far afield of employment."). The Court recognized, for example, that black parents were subjected to a "classic" violation of Section 1981 when their children were refused admission by two local private schools on the basis of race. *Runyon*, 427 U.S. at 172. Prospective members of community homeowners' associations,[16] government contractors,[17] purchasers of home leaseholds,[18] restaurant patrons,[19] and business owners facing racially-based boycotts,[20] among others, have similarly looked to Section 1981 for relief with respect to discrimination and retaliation claims alike. *See also Patterson*, 491 U.S. at 210-211 (Brennan, J., dissenting in part) (collecting cases).

---

[16] *Tillman*, 410 U.S. at 439-440.

[17] *Webster* v. *Fulton County, Ga.*, 283 F.3d 1254 (11th Cir. 2002).

[18] *Pinchback* v. *Armistead Homes Corp.*, 907 F.2d 1447, 1448-1449 (4th Cir. 1990).

[19] *Lizardo* v. *Denny's, Inc.*, 270 F.3d 94, 101-106 (2d Cir. 2001).

[20] *Evans* v. *City of Browning, Mont.*, 953 F.2d 1386 (9th Cir. 1992).

Although petitioner limits its focus to employment discrimination, its argument that Section 1981 provides no remedy against retaliation threatens the efficaciousness of Section 1981 in a much broader array of settings. Were retaliation claims deemed not cognizable under Section 1981, a much wider swath of plaintiffs than petitioner seems willing to acknowledge would be denied a valuable avenue of relief. Because such persons could not sue based on an employment relationship, they could not turn to Title VII—petitioner's ready response to any employee who claims retaliation. In many circumstances, those persons will effectively be denied *any* possible relief for asserting rights the statute purports to protect.

Under petitioner's theory, anyone who has the audacity to assert his or her right to make and enforce contracts regardless of race could be fired, demoted, expelled from school,[21] or even face false criminal charges,[22] without recourse. If Section 1981 provides individuals no recourse against retaliation when they complain about racially discriminatory conduct, they will certainly be chilled from asserting their statutorily guaranteed right to the enjoyment of the benefits of their contracts without regard to race, even in a relatively informal setting such as an internal grievance procedure. Such a result is inconsistent with Con-

---

[21] *See Fiedler* v. *Marmusco Christian Sch.*, 631 F.2d 1144 (4th Cir. 1980) (finding a Section 1981 violation where a white student was expelled for associating with a black child and the student's sister was expelled because their father took steps to challenge the initial expulsion as discriminatory).

[22] *See Burlington*, 126 S. Ct. at 2412 (citing *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

gress's fundamental purpose in enacting Section 1981—to ensure that all persons have the basic civil and economic right to make and enforce contracts, without regard to their race. Congress could not have intended such a perverse result.

IV. The Court Should Continue To Interpret Section 1981 Broadly And In A Manner Consistent With Our National Goal Of Eradicating Racial Discrimination

This country's civil rights laws reflect our "society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson*, 491 U.S. at 174.[23] Sections 1981 and 1982, in particular, reflect Congress's recognition that the social evil of discrimination has been pervasive, and its effort to address that evil in an equally pervasive manner. The Court has therefore given Sections 1981 and 1982 "a sympathetic and liberal construction" consistent with their general language.[24] *Runyon*, 427 U.S. at 192 (Stevens, J., concurring); *see also id.* at 172 (holding that Section 1981 prohibits private schools from excluding students because they are African-American); *McDonald*, 427 U.S. at 287 (holding that

---

[23] *See also Johnson* v. *California*, 545 U.S. 162, 175 (2005) (recognizing "the overriding interest in eradicating discrimination from our civic institutions"); *Runyon*, 427 U.S. at 192 (Stevens, J., concurring) ("The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society."); *NAACP* v. *FPC*, 425 U.S. 662, 665 (1976) (noting "the elimination of discrimination from our society is an important national goal").

[24] While the Court broke from tradition by narrowly interpreting Section 1981 in *Patterson*, Congress immediately responded by providing clarifying language to demonstrate its intention for Section 1981 to be read and applied broadly.

Section 1981 prohibits racial discrimination against whites as well as blacks); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973) (holding that a private association is not exempt from either Section 1981 or Section 1982); *Sullivan*, 396 U.S. at 237 (interpreting Section 1982 to include a claim for retaliation, because to hold otherwise would "give impetus to the perpetuation of racial restrictions on property"); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426-427 (1968) (interpreting the "broad language" of Section 1982 to prohibit discrimination by private individuals).

The broad interpretation adopted in *Jones*, *Sullivan*, and their lineage is "now an important part of the fabric of our law" and should continue to govern Section 1981. *See Runyon*, 427 U.S. at 190 (Stevens, J., concurring). Applying the narrow approach to Section 1981 that petitioner advocates would unravel that fabric. For example, under petitioner's constricted approach, it is doubtful that Section 1981 would protect white persons against discrimination, *see McDonald*, 427 U.S. at 293, or prohibit retaliation against those enforcing their rights under Section 1982, *see Sullivan*, 396 U.S. at 404-405. Petitioner offers no persuasive reason for this Court to turn its back on an interpretive approach to Section 1981 that broadly advances equal rights in contracting, regardless of race. To be consistent with its precedent and its well-settled understanding of the fundamental role of Section 1981 in promoting civil rights, this Court should confirm that Section 1981 prohibits retaliation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MICHAEL FOREMAN
MEGAN MORAN-GATES
ANDREA LOVELESS
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

PAUL R.Q. WOLFSON
Counsel of Record
ANNE HARKAVY
JULIANA MIRABILIO
SUSAN S. FRIEDMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

JANUARY 2008

APPENDIX

APPENDIX

LEADERSHIP CONFERENCE ON CIVIL RIGHTS (LCCR) PARTICIPATING ORGANIZATIONS, 2007-2008

A. Philip Randolph Institute
AARP
ACORN
ADA Watch
Advancement Project
African Methodist Episcopal Church
Alaska Federation of Natives
Alaska Inter-Tribal Council
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American-Arab Anti-Discrimination Committee
American Association for Affirmative Action
American Association of People with Disabilities
American Association of University Women
American Baptist Churches, U.S.A.-National Ministries
American Civil Liberties Union
American Council of the Blind
American Ethical Union
American Federation of Government Employees
American Federation of Labor- Congress of Industrial Organizations
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Friends Service Committee
American Jewish Committee
American Jewish Congress
American Nurses Association

American Postal Workers Union, AFL-CIO
American Society for Public Administration
American Speech-Language-Hearing Association
Americans for Democratic Action
Anti-Defamation League
Appleseed
Asian American Justice Center
Asian Pacific American Labor Alliance
Associated Actors and Artistes of America, AFL-CIO
Association for Education and Rehabilitation of the Blind and Visually Impaired
B'nai B'rith International
Brennan Center for Justice at New York University School of Law
Building & Construction Trades Department, AFL-CIO
Catholic Charities, USA
Center for Community Change
Center for Responsible Lending
Center for Women Policy Studies
Children's Defense Fund
Church of the Brethren-World Ministries Commission
Church Women United
Citizens' Commission on Civil Rights
Coalition of Black Trade Unionists
Common Cause
Communications Workers of America
Community Action Partnership
Community Transportation Association of America
DC Vote
Delta Sigma Theta Sorority
Disability Rights Education and Defense Fund
Division of Homeland Ministries-Christian Church (Disciples of Christ)
Epilepsy Foundation of America

Episcopal Church-Public Affairs Office
Evangelical Lutheran Church in America
FairVote: The Center for Voting and Democracy
Families USA
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Global Rights: Partners for Justice
GMP International Union
Hadassah, The Women's Zionist Organization of America
Hotel and Restaurant Employees and Bartenders International Union
Human Rights Campaign
Human Rights First
Improved Benevolent & Protective Order of Elks of the World
International Association of Machinists and Aerospace Workers
International Association of Official Human Rights Agencies
International Brotherhood of Teamsters
International Union, United Automobile Workers of America
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League
Jewish Community Centers Association
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
Judge David L. Bazelon Center for Mental Health Law
Kappa Alpha Psi Fraternity
Labor Council for Latin American Advancement
Laborers' International Union of North America
Lambda Legal

Lawyers' Committee for Civil Rights Under Law
League of Women Voters of the United States
Legal Momentum
Mashantucket Pequot Tribal Nation
Matthew Shepard Foundation
Mexican American Legal Defense and Education Fund
Na'Amat USA
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Postal & Federal Employees
National Association for Equal Opportunity in Higher Education
National Association for the Advancement of Colored People (NAACP)
National Association of Colored Women's Clubs, Inc.
National Association of Community Health Centers
National Association of Human Rights Workers
National Association of Negro Business & Professional Women's Clubs, Inc.
National Association of Neighborhoods
National Association of Protection and Advocacy Systems
National Association of Social Workers
National Bar Association
National Black Caucus of State Legislators
National Catholic Conference for Interracial Justice
National Coalition for the Homeless
National Coalition on Black Civic Participation
National Coalition to Abolish the Death Penalty
National Committee on Pay Equity
National Community Reinvestment Coalition
National Conference of Black Mayors, Inc.
National Congress for Community Economic Development
National Congress for Puerto Rican Rights
National Congress of American Indians

National Council of Catholic Women
National Council of Churches of Christ in the U.S.
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council on Independent Living
National Education Association
National Employment Lawyers Association
National Fair Housing Alliance
National Farmers Union
National Federation of Filipino American Associations
National Gay & Lesbian Task Force
National Health Law Program
National Institute For Employment Equity
National Korean American Service and Education Consortium, Inc. (NAKASEC)
National Lawyers Guild
National Legal Aid & Defender Association
National Low Income Housing Coalition
National Organization for Women
National Partnership for Women & Families
National Puerto Rican Coalition
National Sorority of Phi Delta Kappa, Inc.
National Urban League
National Women's Law Center
National Women's Political Caucus
Native American Rights Fund
Newspaper Guild
Office of Communications of the United Church of Christ, Inc.
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center
OCA (formerly known as Organization of Chinese Americans)
Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
Poverty & Race Research Action Council (PRRAC)
Presbyterian Church (USA)
Pride at Work
Progressive National Baptist Convention
Project Equality, Inc.
Puerto Rican Legal Defense and Education Fund, Inc.
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union, AFL-CIO
Secular Coalition for America
Service Employees International Union
Servicemembers Legal Defense Network
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
The Association of Junior Leagues International, Inc.
The Association of University Centers on Disabilities
The Justice Project
The National Conference for Community and Justice
The National PTA
Union for Reform Judaism
Unitarian Universalist Association
UNITE HERE!
United Association of Journeymen & Apprentices of the Plumbing& Pipe Fitting Industry of the U.S. & Canada-AFL-CIO
United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries
United Farm Workers of America, AFL-CIO
United Food and Commercial Workers International Union
United Methodist Church-General Board of Church & Society
United Mine Workers of America
United States Conference of Catholic Bishops
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Women of Reform Judaism
Women's American ORT
Women's International League for Peace and Freedom
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board
YWCA of the USA, National Board
Zeta Phi Beta Sorority, Inc.

12/07

80

(14)

No. 06-1431 1-3-08

IN THE
Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

AARON M. PANNER
Counsel of Record
PRIYA R. AIYAR
W. DAVID SARRATT
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Amici Members of Congress

January 3, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. IN ENACTING THE CIVIL RIGHTS ACT OF 1991, CONGRESS RATIFIED THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981 5

A. The Unanimous Rule at the Time of the 1991 Act Was That the Private Right of Action Under § 1981 Included Retaliation 5

1. Sections 1981 and 1982 derive from a single sentence in § 1 of the 1866 Act 6

2. *Runyon* held that § 1981 and § 1982 must be construed in parallel where the operative words are common to the 1866 Act 8

3. *Sullivan*'s holding applies with equal force to § 1982 and § 1981 11

4. At the time of the 1991 Act, the circuit courts unanimously recognized a cause of action for retaliation under § 1981 in reliance on *Sullivan* and *Runyon* 13

5. *Patterson* narrowed the substantive coverage of § 1981, not the scope of the private right of action 15

B. In the 1991 Act, Congress Both Overruled *Patterson* To Make § 1981 Applicable to Post-Formation Conduct and Affirmed the Cause of Action for Retaliation 17

II. OTHER STATUTES PROHIBITING RETALIATION, INCLUDING TITLE VII, DO NOT CAST DOUBT ON THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981 22

A. Title VII Did Not Supplant or Repeal Any Portion of § 1981 22

B. The Adoption of Express Private Rights of Action in Other Statutes Does Not Undermine the Implied Private Right of Action Under § 1981 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Bragdon v. Abbott, 524 U.S. 624 (1998) 18

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) 27

Cannon v. University of Chicago, 441 U.S. 677 (1979) 19, 20

Carter v. South Cent. Bell, 912 F.2d 832 (5th Cir. 1990) 16

Choudhury v. Polytechnic Inst. of New York, 735 F.2d 38 (2d Cir. 1984) 14, 15

Cort v. Ash, 422 U.S. 66 (1975) 19

Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) 26

Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982) 14

Gonzalez v. Home Ins. Co., 909 F.2d 716 (2d Cir. 1990) 16

Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 24

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 4, 5, 12, 13

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 22

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 9, 10, 26

Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) 14

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 17

Lorillard v. Pons, 434 U.S. 575 (1978) 18, 27

Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980) 24

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990) 16

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 4, 19, 20, 25

NLRB v. Scrivener, 405 U.S. 117 (1972) 28

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 3, 5, 10, 15, 16, 17, 18, 19, 21, 25, 26

Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. Unit B 1982) 14

Posadas v. National City Bank, 296 U.S. 497 (1936) 24

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 23

Runyon v. McCrary, 427 U.S. 160 (1976) 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19

Setser v. Novack Inv. Co., 638 F.2d 1137, *vacated in part on reh'g*, 657 F.2d 962 (8th Cir. 1981) 14

Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) 16

Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979) 24

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 4

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 2, 3, 4, 5, 10, 11, 12, 13, 14, 15

Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973) 9

United States v. Borden Co., 308 U.S. 188 (1939) 24

Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573 (11th Cir. 1993) 18

Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977).....14, 15

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Amend. XIII 6, 8, 9

Amend. XIV 7, 8, 9

Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (Civil Rights Act of 1866) 1, 2, 6, 7, 8, 9, 10, 12, 26, 27

§ 1, 14 Stat. 27 .....2, 6, 7, 8, 9, 10, 26

Act of June 27, 1866, ch. 140, 14 Stat. 74..... 8

§ 1, 14 Stat. 74 8

§ 2, 14 Stat. 75 8

Act of May 31, 1870, ch. 114, 16 Stat. 140 (Enforcement Act)..... 7, 8, 9

§ 16, 16 Stat. 144 ..... 7, 8

§ 18, 16 Stat. 144 8

Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 27

Preamble, 108 Stat. 745 27

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* 26

29 U.S.C. § 623(d) 26

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* 26

42 U.S.C. § 12203(a) 26

42 U.S.C. § 12203(b) 26

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 4

Title VII, 42 U.S.C. § 2000e *et seq.* 4, 22, 23, 24, 26

42 U.S.C. § 2000e(b) 23

42 U.S.C. § 2000e-3(a) 26

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 2, 3, 4, 5, 6, 13, 17, 19, 20, 21, 27

Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* 26

29 U.S.C. § 215(a)(3) 26

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* 26

29 U.S.C. § 2615 26

National Labor Relations Act, 29 U.S.C. § 151 et seq. 27, 28

29 U.S.C. § 158(a)(4) 27

Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983) 27, 28

49 U.S.C. § 31105 ..... 27, 28

Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* 26

38 U.S.C. § 4311(b) 26

Rev. Stat.:

§ 1977 8

§ 1978 ..... 8, 9

§ 5596 8

42 U.S.C. § 1981 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

42 U.S.C. § 1981(a) 18

42 U.S.C. § 1981(b) 17, 18

42 U.S.C. § 1981(c) 17, 19

42 U.S.C. § 1981a(b)(4) 23

42 U.S.C. § 1982 ..... 2, 3, 5, 6, 7, 8, 9, 10, 11, 12

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIALS

Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) 26

118 Cong. Rec. 3371-72 (1972) 22

H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137 22

H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 ..... 21, 23

ADMINISTRATIVE MATERIALS

General Accounting Office, *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce* (June 2000), *available at* http://www.gao.gov/new.items/he00076.pdf 24

U.S. Census Bureau, U.S. Dep't of Commerce, *County Business Patterns 2004* (2006), *available at* http://www.census.gov/prod/2006pubs/04cbp/cb0400a1us.pdf 23

OTHER MATERIALS

Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672), *available at* http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2002-1672.mer.ami.pdf 13

Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 Cornell L. Rev. 596 (1988) 23

William N. Eskridge, Jr. et al., *Legislation: Statutes and the Creation of Public Policy* (3d ed. 2001) 21

Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565 (1989) 27

INTEREST OF *AMICI CURIAE*[1]

Amici are Members of Congress[2] who are committed to the protection of civil rights through the enactment and vigorous enforcement of civil rights laws like 42 U.S.C. § 1981. The sweeping language of § 1981, enacted as part of the Civil Rights Act of 1866 ("1866 Act"), was designed to protect the contract and property rights of newly freed slaves. The 1866 Act was a broad and historic statement of equality that has been interpreted by the courts to provide mechanisms for effective enforcement of its guarantees. The courts have thus recognized that, as under other civil rights statutes, protection against retaliation – sanctions imposed on individuals who complain about alleged discriminatory treatment of themselves or others – is critical to effective enforcement of the statute. Without this protection, unlawful race discrimination would go unreported and unremedied, and the core purpose of the statute would be defeated.

Amici legislate against the backdrop of existing judicial interpretation and rely upon the courts, in application of the principle of *stare decicis*, to adhere to existing precedent when interpreting congressional action. That principle is squarely implicated

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Respondent has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of petitioner has been filed with the Clerk.

[2] The 65 Members of Congress who are joining this brief are listed in the appendix.

here, because, when Congress amended § 1981 by passing the Civil Rights Act of 1991, the right to sue for retaliation under § 1981 was firmly established by the courts. Congress did not alter that judicial interpretation, and the Court should give effect to Congress's decision to preserve the existing cause of action for retaliation under § 1981 by affirming the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, an African-American man, was fired from his job and alleged (and proffered evidence to show) that the firing was based on (1) race-based animus against him and (2) complaints he raised about race-based discrimination against himself and a co-worker who is an African-American woman. Section 1981 of Title 42, United States Code, protects the right "to make and enforce contracts" free from racial discrimination. That a race-based firing gives rise to a private right of action under § 1981 is conceded. The question presented is whether an individual may maintain an action under § 1981 if he has suffered a sanction – retaliation – for *complaining about* race-based discrimination in employment or another contractual context.

This Court effectively resolved that question in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), when it held that an individual expelled from a community park association as a result of his "trying to vindicate the rights of minorities protected by § 1982" had a cause of action under that statute. *Id.* at 237. The Court also has made clear that, because both § 1981 and § 1982 derive from § 1 of the Civil Rights Act of 1866 ("1866 Act"), the Court's construction of the implied private right of action under

§ 1982 applies equally to § 1981. *See Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976).

Prior to Congress's amendment of § 1981 in the Civil Rights Act of 1991 ("1991 Act"), the courts of appeals had uniformly ruled, relying on *Sullivan* and *Runyon*, that § 1981 provides a cause of action for retaliation. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not alter the scope of that private right of action. In particular, *Patterson* did not cast doubt on either *Sullivan*'s holding that the private right of action under § 1982 extends to retaliation or *Runyon*'s holding that the private right of action implied under § 1981 must have the same scope as the private right of action implied under § 1982. Rather, *Patterson* had the effect of eliminating many retaliation claims by construing narrowly the type of contract-related conduct that fell within the *substantive* ambit of § 1981, holding that the right "to make and enforce contracts" free from racial discrimination did not include conduct occurring after the formation of a contract. Thus, under *Patterson*, because post-formation conduct (like race-based harassment of an employee) did not substantively violate the statute, an individual whose claim of retaliation was based on post-formation conduct had no cause of action. Retaliation claims involving the making or enforcement of a contract, however, were still viable after *Patterson*.

Against this backdrop, the 1991 Act unambiguously confirmed that § 1981 provides a private right of action for retaliation. In the Act, Congress legislatively overruled *Patterson* by including post-formation conduct within the definition of "mak[ing] and enforc[ing] contracts." As a result, in a situation where (as here) an African-American suffers

workplace discrimination because of his race, he is covered by § 1981. Congress did nothing to alter the broad equal rights language under which courts had unanimously implied a private right of action for retaliation. Accordingly, Congress ratified the law recognizing retaliation claims under § 1981. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982). Under *Sullivan* and the unanimous circuit court precedent that Congress ratified in the 1991 Act, retaliation against an individual who complains about alleged conduct that violates § 1981 is covered. *See also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176-77 (2005). To overrule *Sullivan* and to remove an implied private right of action on which Congress relied would flout both congressional intent and principles of *stare decisis*, which have their greatest force in circumstances like these.

Neither the availability of a remedy for retaliation under Title VII of the Civil Rights Act of 1964, nor the enactment of express private rights of action for retaliation in other statutes, supports Petitioner's argument. Nothing in Title VII impliedly repealed the long-recognized cause of action for retaliation under § 1981. And, because the private right of action under § 1981 is implied, not express, and had been construed to include a cause of action for retaliation, Congress's failure in 1991 to adopt an express private right of action – either for retaliation or for any other violation of § 1981 – provides no evidence of intent to limit or abolish any cause of action under that statute.

ARGUMENT

I. IN ENACTING THE CIVIL RIGHTS ACT OF 1991, CONGRESS RATIFIED THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981

Prior to 1991, unanimous court of appeals precedent recognized a private right of action for retaliation under § 1981 in reliance on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Runyon v. McCrary*, 427 U.S. 160 (1976), cases that still control. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), eliminated a category of retaliation claims *not* by changing the scope of that private right of action, but by altering the *substantive coverage* of § 1981 to exclude post-formation conduct.

In the Civil Rights Act of 1991 ("1991 Act"), Congress restored the statute's coverage of post-formation conduct without changing the provision of § 1981 under which courts had uniformly implied a cause of action for retaliation. Under this Court's well-settled principles of statutory construction, Congress thereby ratified the existing judicial interpretation. The legislative history of the 1991 Act confirms Congress's understanding that it was ratifying the pre-existing judicial interpretation of § 1981 to cover claims of retaliation.

A. The Unanimous Rule at the Time of the 1991 Act Was That the Private Right of Action Under § 1981 Included Retaliation

In *Sullivan*, this Court held that the private right of action under 42 U.S.C. § 1982 encompassed claims for retaliation. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) ("[I]n *Sullivan* we interpreted [§ 1982] . . . to cover retaliation against those who advocate the rights of groups protected by

that prohibition."). In *Runyon*, the Court confirmed that, because "both § 1981 and § 1982 derive" from § 1 of the Civil Rights Act of 1866 ("1866 Act"), a "consistent interpretation of the law necessarily requires the conclusion that § 1981 [must be construed] like § 1982." 427 U.S. at 170, 173. Accordingly, prior to the 1991 Act, the circuit courts uniformly and correctly interpreted the private right of action under § 1981 to include retaliation for complaints about race-based discrimination in contracting.

1. Sections 1981 and 1982 derive from a single sentence in § 1 of the 1866 Act

The provisions currently codified in § 1981 and § 1982 were originally enacted together, pursuant to the Thirteenth Amendment, *see Runyon*, 427 U.S. at 170, as § 1 of the 1866 Act. That section provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to

> like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[3]

Thus, § 1 of the 1866 Act enumerated a series of rights – including the right "to make and enforce contracts," now codified in § 1981, and the right "to inherit, purchase, lease, sell, hold, and convey real and personal property," now codified in § 1982 – in a *single sentence* declaring that people "of every race and color" shall enjoy the enumerated rights to the same extent as white citizens.

On May 31, 1870, Congress enacted what is known as the Enforcement Act (sometimes called the Voting Rights Act) ("1870 Act"),[4] which contained two provisions relevant to consideration of the 1866 Act. First, § 16 of the 1870 Act provided, in relevant part:

> That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .

16 Stat. 144. This provision, enacted pursuant to the recently adopted Fourteenth Amendment, tracked the language of § 1 of the 1866 Act. Section 16 of the Enforcement Act, however, applied to "all persons within the jurisdiction of the United States," rather

---

[3] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27. The underlined portion makes up the relevant portions of § 1981 and § 1982.

[4] *See* Act of May 31, 1870, ch. 114, 16 Stat. 140.

than just citizens, and omitted in the list of enumerated rights those relating to real and personal property. The intended effects of these alterations were unclear, because § 18 of the 1870 Act "re-enacted" the 1866 Act *in its entirety* and provided that § 16 of the 1870 Act "shall be enforced according to the provisions of said [1866] Act." *Id.*

Meanwhile, by Act of June 27, 1866,[5] Congress appointed a group of commissioners "to revise, simplify, arrange, and consolidate all statutes of the United States." § 1, 14 Stat. 74. Specifically, the commissioners were charged with "bring[ing] together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments." *Id.* § 2, 14 Stat. 75. By 1873, the Revisers had completed their work, and on June 22, 1874, Congress enacted the codified Revised Statutes into law, while simultaneously repealing all of the previous, non-codified versions. *See* Rev. Stat. § 5596. In the new Revised Statutes, § 1977 (which became 42 U.S.C. § 1981) read as did § 16 of the 1870 Act, and § 1978 read as does the current 42 U.S.C. § 1982. The Revised Statutes, however, gave no indication that any part of § 1 of the 1866 Act was intended to be repealed.

2. Runyon *held that § 1981 and § 1982 must be construed in parallel where the operative words are common to the 1866 Act*

More than a century later, in *Runyon v. McCrary*, the question arose whether Rev. Stat. § 1977, now § 1981, embodied § 1 of the 1866 Act (the Thirteenth Amendment statute) or § 16 of the 1870 Act (the Fourteenth Amendment statute), or both.

---

[5] *See* Act of June 27, 1866, ch. 140, 14 Stat. 74.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court had ruled that Rev. Stat. § 1978, now § 1982, derived from the 1866 Act and prohibited not only discrimination through state action, but also private acts of discrimination. *Runyon* presented the same question with respect to § 1981. Thus, as Justice White noted in dissent in *Runyon*, "[o]ne of the major issues in this case plainly is whether the construction in *Jones v. Alfred H. Mayer Co.* placed on similar language contained in 42 U.S.C. § 1982 . . . prevents this Court from independently construing the language in 42 U.S.C. § 1981." 427 U.S. at 195 n.5 (White, J., dissenting) (citation omitted). After reviewing the history outlined above, the Court held (as it had previously suggested) that "'[t]he operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27.'" *Id.* at 171 (quoting *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439 (1973)) (alteration in original).[6] Therefore,

> [a]s the Court indicated in *Jones*, [392 U.S.] at 441-443, n. 78, [its] holding necessarily implied that the portion of § 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination. The statutory holding in *Jones* was that the "[1866] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of

---

[6] Resolution of that issue was necessary to the result, as Justice White, in dissent, argued that § 1981 did not derive from § 1 of the 1866 Act (the Thirteenth Amendment statute), but rather solely from the 1870 Act (the Fourteenth Amendment statute). The Fourteenth Amendment applies only to state action.

> law, with respect to the rights enumerated therein – including the right to purchase or lease property," 392 U.S. at 436. One of the "rights enumerated" in § 1 is "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 14 Stat. 27.

Id. at 170 (fourth alteration and ellipses in original, parallel citations omitted). Accordingly, the Court held, the issue presented in *Runyon* was controlled by the force of the Court's previous decision interpreting § 1982 as a matter of *stare decisis*:

> The [petitioners] argue principally that § 1981 does not reach private acts of racial discrimination. That view is wholly inconsistent with *Jones*' interpretation of the legislative history of § 1 of the Civil Rights Act of 1866, an[] interpretation that was reaffirmed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, and again in *Tillman v. Wheaton-Haven Recreation Assn.*, *supra*. And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct.

Id. at 173 (parallel citations omitted). Although *Jones* and *Sullivan* involved § 1982, the Court concluded that their holdings "necessarily require[d]" the result in *Runyon*. The Court thus established that § 1981 and § 1982 must be construed in parallel where the language at issue in each statute derives from § 1 of the 1866 Act.[7]

---

[7] This Court expressly reaffirmed *Runyon* in *Patterson*. *See* 491 U.S. at 171-72, 175.

3. Sullivan's *holding applies with equal force to § 1982 and § 1981*

Sullivan held that claims for retaliation, that is, "punish[ment] for trying to vindicate the rights of minorities protected by § 1982," 396 U.S. at 237, are actionable under § 1982. In that case, petitioner Sullivan owned a house in the area of Little Hunting Park, where a homeowners group, of which Sullivan was a member, formed a non-stock corporation to operate a community park for the benefit of residents. Sullivan leased his house to an African-American man (Freeman) and, as the bylaws of the corporation allowed, sought to assign to Freeman his membership share in the corporation for the term of the lease. Because Freeman was African-American, the corporation refused to approve the assignment, and, when Sullivan protested, he was expelled from the corporation. Both Sullivan and Freeman sued. With respect to "Sullivan's expulsion for the advocacy of Freeman's cause," the Court held:

> If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. . . . [T]here can be no question but that Sullivan has standing to maintain this action.

Id.

This Court has recognized that *Sullivan* controls the interpretation of § 1981. *Runyon* expressly held that, with respect to § 1981 and § 1982, an interpretation of the scope of protection afforded rights in one section "necessarily requires" the same interpretation of the other section. This Court has never

contemplated that § 1981 and § 1982, with their common structure and origin in a single sentence of the 1866 Act, could be construed inconsistently.

Furthermore, the principle announced in *Sullivan* – that "punish[ment] for trying to vindicate the rights of minorities" is actionable – does not depend on whether the rights at stake are property rights or contract rights. Indeed, many property rights might easily be recharacterized as contract rights and vice versa: a lease is also a contract, as is a membership share in a corporation. Imagine if a corporation's standard employment contract required the termination of any African-American employee who exercised stock options without the permission of all white employees. Is this a discriminatory burden on the conversion of property, or a discriminatory term of employment? It is legitimately characterized as both, and a person's right to sue for being retaliated against after complaining of such a provision should not turn on the characterization. *Sullivan*'s holding certainly did not depend on describing a lease and a share in a corporation as property rights rather than contract rights. Rather, *Sullivan* relied on words shared by § 1981 and § 1982 (because of their common derivation) that prohibit discriminatory treatment, whether in contracting or property rights, and *Runyon* requires that those words be given the same construction in both statutes.

Two Terms ago in *Jackson*, the Court confirmed that the holding of *Sullivan* did not depend on any special characteristic of property rights. Rather, in the *Jackson* Court's words, *Sullivan* acknowledged the reality that, "without protection against retaliation, the underlying discrimination is perpetuated." 544 U.S. at 180 (citing *Sullivan*, 396 U.S. at 237).

Thus, upholding "Sullivan's cause of action under 42 U.S.C. § 1982 for '[retaliation] for the advocacy of [the black person's] cause,'" *id.* at 176 (quoting *Sullivan*, 396 U.S. at 237; alterations in *Jackson*), was necessary to effect the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866," *Sullivan*, 396 U.S. at 237. Indeed, as the United States argued in *Jackson*, and as the Court agreed, such protection "'would be difficult, if not impossible, to achieve if persons who complain about [race] discrimination did not have effective protection against retaliation.'" *Jackson*, 544 U.S. at 180 (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 13, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672)).[8]

4. At the time of the 1991 Act, the circuit courts unanimously recognized a cause of action for retaliation under § 1981 in reliance on Sullivan *and* Runyon

Prior to the 1991 Act, the circuit courts repeatedly confronted the question whether § 1981, which "prohibits racial discrimination in the making and

---

[8] The dissenting Justices in *Jackson* argued that *Sullivan* merely recognized "that a white lessor had standing to assert the right of a black lessee to be free from racial discrimination." 544 U.S. at 194 (Thomas, J., dissenting). The dissent also argued that Sullivan could "make out [a] third-party claim on behalf of the black lessee" only if he could "demonstrate that the defendant had discriminated against the black lessee on the basis of race." *Id.* Even if the dissent's reading of *Sullivan* were correct – which it is not, given that *Jackson* specifically stated that "*Sullivan*'s holding was not so limited," *id.* at 176 n.1 – Humphries still would be entitled to a remand to the district court, where he would have the opportunity to prove that the discrimination of which he complained actually occurred.

enforcement of private contracts," *Runyon*, 427 U.S. at 168, covered retaliation for complaints about discrimination.[9] "The ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself," and a "person who believes he has been discriminated against because of his race should not be deterred from attempting to vindicate his rights because he fears his employer will punish him for doing so." *Goff*, 678 F.2d at 598. The circuit courts recognized that § 1981 "would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute." *Id.*; *see also Choudhury*, 735 F.2d at 43 ("We are unwilling to 'give impetus to the perpetuation' of racial discrimination by permitting an employer, with impunity, to penalize its employee for asserting rights under § 1981.") (quoting *Sullivan*, 396 U.S. at 237); *Setser*, 638 F.2d at 1146 (same).

The circuit courts also recognized that the right to be free from race-based discrimination in contracts would be hollow if individuals could be punished for speaking out against discrimination suffered by others. *See, e.g., Winston*, 558 F.2d at 1268 ("Section 1981 provides a cause of action to a White Party . . . who [was] fired . . . for protesting an asserted racially

---

[9] *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987) (retaliation cognizable under § 1981); *Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 43-44 (2d Cir. 1984) (same); *Goff v. Continental Oil Co.*, 678 F.2d 593, 597-99 (5th Cir. 1982) (same); *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1229 n.15 (5th Cir. Unit B 1982) (per curiam) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (same), *vacated in part on other grounds on reh'g*, 657 F.2d 962 (8th Cir. 1981) (en banc); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same).

motivated firing of a Non-White Party."). They directly relied on *Sullivan*, where this Court held that, if a white property holder could be "punished for trying to vindicate the rights of minorities protected by § 1982," that sanction "would give impetus to the perpetuation of racial restrictions on property," as "the white owner is at times the only effective adversary of the unlawful restrictive covenant." 396 U.S. at 237 (internal quotation marks omitted); *see Winston*, 558 F.2d at 1270 ("[N]o reason is seen not to apply the rationale of *Sullivan* in interpreting Section 1981.").

Prior to *Patterson*, the circuit courts did not question whether § 1981 substantively covered post-formation conduct. Accordingly, the courts held that, under *Sullivan* and *Runyon*, § 1981 covered retaliation for complaints about discrimination, and they assumed that such actionable retaliation could occur either at or after formation of a contract. The circuit courts found it "difficult to see any reason" to "interpret the language of Section 1981 differently from the manner in which the [Supreme] Court [had] interpreted Section 1982" in *Sullivan*, especially in light of the two sections' shared "identity of historical source and similarity of language and intent." *Winston*, 558 F.2d at 1270; *see also Choudhury*, 735 F.2d at 43 n.5 (citing *Runyon* for the holding that, "[b]ecause of the related origins and language of the two sections, they are generally construed *in pari materia*").

5. Patterson *narrowed the substantive coverage of § 1981, not the scope of the private right of action*

In 1989, this Court decided *Patterson*, holding that the "to make and enforce contracts" language in

§ 1981 covered "only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process," 491 U.S. at 179-80, *not* "conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations," *id.* at 171. The Court applied this rule to conclude that § 1981 did not provide a cause of action for race-based harassment of an employee that occurred after formation of the employment contract.

This Court's narrow construction of § 1981's substantive scope led the circuit courts to hold that, under *Patterson*, retaliation claims under § 1981 were no longer cognizable *if the retaliatory conduct did not relate to the formation or enforcement of a contract*. *See Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 720 (2d Cir. 1990) (post-formation retaliatory conduct no longer actionable under § 1981 after *Patterson*); *Carter v. South Cent. Bell*, 912 F.2d 832, 838-41 (5th Cir. 1990) (same); *McKnight v. General Motors Corp.*, 908 F.2d 104, 111-12 (7th Cir. 1990) (same); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990) (per curiam) (same). At the same time, however, the lower courts recognized that *Patterson* did not cast doubt on the principle that a private right of action for retaliation existed *where the retaliation did concern the making or enforcement of a contract*. *See, e.g., Sherman*, 891 F.2d at 1535 (after *Patterson*, "an employer's retaliatory conduct falls under section 1981 only when the employer aims to prevent or discourage an employee from using legal process to enforce a specific contract right"); *McKnight*, 908 F.2d at 111 ("[r]etaliation or a threat to retaliate is a common method of deterrence, and if what is sought to be deterred is the enforcement

of a contractual right, then, we may assume, the retaliation or threat is actionable under section 1981 as interpreted in *Patterson*"). It was thus plain both before and after *Patterson* that, whatever the substantive coverage of § 1981, individuals punished for complaining about alleged violations of the statute had a private right of action for retaliation. Indeed, *Patterson* specifically reaffirmed *Runyon*'s holding that racial discrimination in private contracts may be remedied through a private right of action under § 1981. *See* 491 U.S. at 172-73 (basing its conclusion on "[c]onsiderations of *stare decisis*," which "have special force in the area of statutory interpretation").

B. In the 1991 Act, Congress Both Overruled *Patterson* To Make § 1981 Applicable to Post-Formation Conduct and Affirmed the Cause of Action for Retaliation

Congress legislatively reversed the holding of *Patterson* by passing the 1991 Act, which added the current subsections (b) and (c) to § 1981. Subsection (b) broadly defines the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Subsection (c) provides that the "rights protected by this section are protected against impairment by nongovernmental discrimination." *Id.* § 1981(c).

This Court has acknowledged that the 1991 Act's amendments to § 1981 were enacted in direct response to *Patterson*. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) ("Other sections of the [1991] Act were obviously drafted with 'recent decisions of the Supreme Court' in mind. Thus, § 101 . . . amended the 1866 Civil Rights Act's prohibition

of racial discrimination in the 'mak[ing] and enforce[ment] [of] contracts,' 42 U.S.C. § 1981 (1988 ed., Supp. IV), in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) . . . .") (first alteration added, parallel citations omitted); *see also Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1577 (11th Cir. 1993) ("[o]ne effect of the 1991 Act . . . is to make the rule in *Patterson* obsolete").

In overruling *Patterson*, Congress did not alter the original language of § 1981 now found in subsection (a), which courts had consistently interpreted to create a private right of action for retaliation. Rather, Congress added subsection (b) broadly to define the phrase "make and enforce contracts" and to leave no doubt that the phrase substantively covered post-formation conduct. Accordingly, with respect to the cause of action under subsection (a), this case calls for application of the doctrine of ratification, under which "Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well").

That doctrine is particularly relevant when Congress reenacts a statute with an implied private right of action. "When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts" – as was the case with respect to retaliation under § 1981 – "Congress need not have intended to create a new remedy, since

one already existed; the question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982); *see also Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979) (even under the "strict approach" dictated by *Cort v. Ash*, 422 U.S. 66 (1975), for implying causes of action, "our evaluation of congressional action . . . must take into account its contemporary legal context").

Under the doctrine of ratification, the fact that Congress did not change the statutory provision in § 1981 under which courts had uniformly implied a cause of action for retaliation, but actually defined that provision to ensure that courts would interpret its substantive reach to cover post-formation conduct, demonstrates that Congress intended to preserve the cause of action. *See Merrill Lynch*, 456 U.S. at 381-82 ("In that context [where courts had implied a private right of action], the fact that a comprehensive reexamination and significant amendment of the [Commodity Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.").[10]

---

[10] Congress's addition of subsection (c), codifying *Runyon*'s holding that § 1981 extended to non-governmental conduct, confirms that the 1991 Act addressed the *substantive coverage* of § 1981 while leaving the implied cause of action unaltered. In *Patterson*, the Court had called for rebriefing and reargument on the question, not presented by the parties, whether *Runyon* should be overruled. Congress's response to *Patterson* – which affected the substantive coverage of § 1981, not the existence or scope of the cause of action – was to codify the decision to uphold *Runyon* and to overrule the decision that § 1981 did not encompass post-formation conduct.

The existence of retaliation claims under § 1981 was part of the "contemporary legal context" in which Congress legislated in 1991. *Cannon*, 441 U.S. at 698-99. The legislative history of the 1991 Act confirms that lawmakers would have been aware that the courts had construed § 1981 to create a private right of action for retaliation. *See Merrill Lynch*, 456 U.S. at 378 ("In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping.")

The official report of the House Committee on Education and Labor, the committee to which the 1991 Act had been assigned, shows that lawmakers would have known that courts recognized retaliation claims under § 1981:

> In cutting back the scope of the rights to "make" and "enforce" contracts[,] *Patterson* also has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981. *See, e.g.*, *Overby* v. *Chevron U.S.A., Inc.*, 884 F.2d 470 (9th Cir. 1989) (affirming summary judgment against employee on claim of retaliation for protesting racial discrimination in job promotions); *Sherman* v. *Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990) (reversing award of damages in employee's favor on a claim of retaliation for filing an EEOC discrimination charge); *Malhotra* v. *Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) (questioning whether rights against retaliation survive

> Supreme Court's decision in *Patterson*). Section 210 would restore rights to sue for such retaliatory conduct.

H.R. Rep. No. 102-40(I), at 92 n.92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630; *see also id.* at 92 ("The Committee finds that the Supreme Court's ruling in *Patterson* conflicts with a substantial body of federal appellate case law defining the scope of section 1981."). Thus, legislators would have been aware that, when Congress acted to extend the express coverage of the statute to post-formation conduct, it similarly restored retaliation claims based on post-formation conduct. Indeed, the House Report explicitly referred to the expectation that retaliation claims would be brought under the amended § 1981:

> Section 210 would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b). . . . The Committee intends this provision to bar all race discrimination in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring.

Id. (emphasis added).

Thus, the legislative history of the 1991 Act indicates that Members of Congress understood the amendments to § 1981 as reversing *Patterson*'s holding that § 1981 did not apply to post-formation conduct, and affirming the existence of a private right of action for retaliation under § 1981. *See, e.g.*, William N. Eskridge, Jr. et al., *Legislation: Statutes and the Creation of Public Policy* 947 (3d ed. 2001) ("Most

legislation is essentially written in committee or sub-committee, and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.").

II. OTHER STATUTES PROHIBITING RETALIATION, INCLUDING TITLE VII, DO NOT CAST DOUBT ON THE CAUSE OF ACTION FOR RETALIATION UNDER § 1981

Contrary to Petitioner's assertions, neither the availability of a remedy for retaliation under Title VII, nor the enactment of express rights of action for retaliation in other statutes, supports reversing the settled interpretation of § 1981 as providing a private right of action for retaliation.

A. Title VII Did Not Supplant or Repeal Any Portion of § 1981

Congress never intended for Title VII to supplant § 1981. "In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of [§ 1981], and that the two procedures augment each other and are not mutually exclusive.'" *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (quoting H.R. Rep. No. 92-238, at 19 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154) (first alteration in original). Indeed, Congress rejected an amendment that would have rendered § 1981 unavailable to employment discrimination plaintiffs. *See* 118 Cong. Rec. 3371-72 (1972) (statement of Sen. Williams) ("[T]o make title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act. It would jeopardize the degree and scope of remedies available to the work-

ers of our country."). Congress envisioned a vital role for § 1981 in combating employment discrimination even following the enactment of Title VII. *See, e.g.*, H.R. Rep. No. 102-40(I), at 90 (describing § 1981 as "one of our nation's most important employment discrimination laws"), *reprinted in* 1991 U.S.C.C.A.N. 628; 42 U.S.C. § 1981a(b)(4) (providing that Title VII's ceiling on compensatory and punitive damages does not limit the scope of relief available under § 1981).

Section 1981, moreover, provides the only federal remedy for race-based discrimination in employment contracts for a large number of American workers. Approximately 20 percent of American employees are not covered under Title VII because their employers fall within the statutory exclusion for employers with fewer than 15 employees.[11] *See* 42 U.S.C. § 2000e(b); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304 n.3 (1994) (noting that, "[e]ven in the employment context, § 1981's coverage is broader than Title VII's"). Another 5 to 30 percent of workers are not protected under Title VII because they are

---

[11] The 20-percent figure is based on 2004 census data and the assumption that approximately half of the employees who work for employers with 10 to 19 employees are employees who work for employers with 10 to 14 employees. The assumption is necessary because the census tallies the number of employees who work for establishments with 1 to 4 employees, 5 to 9 employees, and 10 to 19 employees; it does not subdivide the latter category. *See* Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 Cornell L. Rev. 596, 602 n.42 (1988) (noting the EEOC's assumption that half of the employees in the latter category work for employers with 10 to 14 employees); U.S. Census Bureau, U.S. Dep't of Commerce, *County Business Patterns 2004*, at 5, Table 2 (2006), *available at* http://www.census.gov/prod/2006pubs/04cbp/cb0400a1us.pdf.

independent contractors who fall outside of the statutory definition of "employee."[12]

In any event, Petitioner's argument that the creation of a remedy for retaliation under Title VII somehow extinguished that remedy under § 1981 is inconsistent with basic principles of statutory construction, in particular the "cardinal rule . . . that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). This Court has consistently held that, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (citations omitted). Petitioner and its *amici* present no justification for ignoring this long-standing clear-statement rule, especially given the clarity of Congress's intent for Title VII and § 1981 to operate together. In any event, this Court has already "held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the . . . 19th-century statute . . . now codified at 42 U.S.C. § 1981." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979).

Because Title VII and § 1981 provide independent and complementary remedies, the availability of a retaliation remedy under Title VII does not counsel against recognition of a similar remedy under § 1981.

---

[12] *See, e.g., Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979); General Accounting Office, *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce* 10 (June 2000), *available at* http://www.gao.gov/new.items/he00076.pdf.

B. The Adoption of Express Private Rights of Action in Other Statutes Does Not Undermine the Implied Private Right of Action Under § 1981

Any suggestion that Congress intended to eliminate the uniformly recognized cause of action for retaliation under § 1981 because it did not enact a new provision expressly authorizing such a cause of action has no merit. In the circumstances of the 1991 amendments – unlike in circumstances where Congress drafts statutes that have not been extensively interpreted by the federal judiciary – Congress had no reason to add an explicit private right of action for retaliation, because that right was already established under existing judicial interpretation of § 1981.

As described above, when Congress amended § 1981, the circuit courts had unanimously held that § 1981 created a private right of action for retaliation. Congress's intention to ratify that uniform rule is evidenced not only by the legislative history, but also – and primarily – by Congress's decision to leave the relevant statutory language unaltered. "Congress could have made its intent clearer only by expressly providing for a private cause of action [for retaliation] in the statute. In the legal context in which Congress acted, this was unnecessary." *Merrill Lynch*, 456 U.S. at 387. For the same reason that Congress chose not to add a reference to *any* private right of action in the 1991 amendments to § 1981, it did not add an explicit reference to "retaliation." There was no reason to spell out what was clearly understood. Indeed, the 1991 amendments do not refer to "harassment," the very post-formation conduct at issue in *Patterson*. Instead of describing

in detail the categories of conduct that were actionable under § 1981, Congress reversed *Patterson*'s holding and ratified uniform circuit court precedent with respect to the scope of the private right of action.

Petitioner and its *amici* also contend that Congress's inclusion of anti-retaliation clauses in other statutes is instructive, and that, if this Court were to hold that § 1981 covers retaliation, then those provisions would somehow be rendered superfluous. That contention ignores the fundamental difference between § 1981 and modern civil rights statutes that contained anti-retaliation provisions from the start.[13] The sweeping language of § 1 of the 1866 Act reflects Congress's aim to overturn this Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), that African-Americans could not be citizens, and to protect the contract and property rights of newly freed slaves broadly and generally. The floor manager of the 1866 Act, a representative from Iowa, stated that the Act's "'end is the maintenance of freedom .... A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery.'" *Jones*, 392 U.S. at 443-44 (quoting Cong. Globe, 39th Cong., 1st Sess. 1118 (1866)) (ellipsis in original).

---

[13] *See, e.g.*, 42 U.S.C. § 2000e-3(a) (anti-retaliation provision in Title VII, enacted in 1964); 29 U.S.C. § 623(d) (anti-retaliation provision in Age Discrimination in Employment Act, enacted in 1967); 42 U.S.C. § 12203(a), (b) (anti-retaliation provisions in Americans with Disabilities Act, enacted in 1990); 29 U.S.C. § 2615 (anti-retaliation provision in Family and Medical Leave Act, enacted in 1993); 38 U.S.C. § 4311(b) (anti-retaliation provision in Uniformed Services Employment and Reemployment Rights Act, enacted in 1994); *see also* 29 U.S.C. § 215(a)(3) (anti-retaliation provision in Fair Labor Standards Act, enacted in 1938).

The 1866 Act was a broad and historic statement of principle, not a modern, highly reticulated statute that might be expected to list specific types of prohibited conduct like harassment and retaliation. *See generally* Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 579-90 (1989). And, by 1991, when Congress amended § 1981, the private rights of action under § 1981 were elaborated by judicial interpretation and included a cause of action for retaliation. Congress relied on that interpretation by leaving it unaltered when adopting the 1991 Act. *See Lorillard*, 434 U.S. at 580. There was no reason for Congress to do more.

Petitioner cites only one statute that Congress amended to add an explicit anti-retaliation provision – the National Labor Relations Act ("NLRA"). *See* 29 U.S.C. § 158(a)(4) (anti-retaliation provision in NLRA, enacted in 1935 and amended to include anti-retaliation clause in 1947).[14] But, here again,

---

[14] Petitioner also references (at 18) the "Surface Transportation Assistance Act of 1982" ("STAA") as being "amended in 1994 to protect against retaliation," citing 49 U.S.C. § 31105. In reality, the anti-retaliation provision in the STAA had existed from the statute's enactment. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (plurality) ("Section 405 [codified at 49 U.S.C. § 31105] was enacted in 1983 . . . [and] protects employee 'whistle-blowers' by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards."). In 1994, Congress passed Public Law No. 103-272 "to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, . . . and to make other technical improvements to the Code." Act of July 5, 1994, Pub. L. No. 103-272, Preamble, 108 Stat. 745, 745. The anti-

Congress acted in the *absence* of judicial construction of the statute implying a right of action for retaliation prior to its amendment. *See NLRB v. Scrivener*, 405 U.S. 117, 122-23 (1972) (explaining that the anti-retaliation provision in the NLRA "had its origin" in a predecessor statute). Congress's ratification of the judicially implied cause of action for retaliation under § 1981 is fully consistent with its inclusion of an express anti-retaliation provision in other statutes where there was no such background rule on which to rely.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

AARON M. PANNER
Counsel of Record
PRIYA R. AIYAR
W. DAVID SARRATT
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for Amici
Members of Congress

January 3, 2008

---

retaliation provision found in § 31105 was thus recodified by Congress in 1994; it was not added to the STAA.

APPENDIX

Members of Congress Joining *Amicus* Brief in Support of Respondent in *CBOCS West, Inc. v. Humphries*, No. 06-1431

John Conyers
Jerrold Nadler
Neil Abercrombie
Gary L. Ackerman
Joe Baca
Xavier Becerra
Howard L. Berman
Sanford D. Bishop Jr.
Rick Boucher
Corrine Brown
G. K. Butterfield
Yvette D. Clarke
James E. Clyburn
Steve Cohen
Joe Courtney
Joseph Crowley
Artur Davis
Danny K. Davis
William D. Delahunt
Keith Ellison
Eliot L. Engel
Eni F. H. Faleomavaega
Charles A. Gonzalez
Al Green
Raul M. Grijalva
Luis Gutierrez
Jane Harman
Ruben Hinojosa
Mazie K. Hirono
Rush D. Holt
Michael M. Honda
Steve Israel
Jesse L. Jackson Jr.
Sheila Jackson Lee
Dennis J. Kucinich
John B. Larson
Barbara Lee
John Lewis
Zoe Lofgren
Doris O. Matsui
Betty McCollum
Kendrick B. Meek
George Miller
Gwen Moore
Grace F. Napolitano
Eleanor Holmes Norton
Frank Pallone Jr.
Ed Pastor
Charles B. Rangel
Silvestre Reyes
Ciro D. Rodriguez
Steven R. Rothman
Bobby L. Rush
Linda T. Sanchez
Debbie Wasserman Schultz
Robert C. "Bobby" Scott
Jose E. Serrano
Albio Sires
Bennie G. Thompson
Edolphus Towns
Chris Van Hollen
Nydia M. Velázquez
Diane E. Watson
Anthony D. Weiner
Robert Wexler

57638 a

40 pgs

No. 06-1431

IN THE

Supreme Court of the United States

CBOSC WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
TAMMANY M. KRAMER
HELLER, HURON, CHERTKOF LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
STATUTE AT ISSUE	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THE SCOPE OF THE ISSUE	7
II. SECTION 1981 COVERS RETALIATION UNDER THE COURT'S PRECEDENTS, CONSISTENT WITH THE WILL OF CONGRESS	7
A. Section 1981 Covers Retaliation under the Court's Precedents Interpreting Thirteenth Amendment Statutes	7
1. The Four Significant Thirteenth Amendment Decisions: *Jones*, *Sullivan*, *Johnson* and *Runyon*	7
2. Section 1981 Covers Retaliation under the Court's Thirteenth Amendment Decisions	14
B. In the Civil Rights Act of 1991, Congress Rejected *Patterson*'s Holding Narrowing the Reach of § 1981	15
1. *Patterson*	15

TABLE OF CONTENTS—Continued

Page

2. The Sweep of the 1991 Civil Rights Act in Overriding *Patterson* 16

3. Retaliation Is Covered by the Text of the 1991 Amendments to § 1981 18

C. *Jackson* Confirms that § 1981 Covers Retaliation 20

D. Considerations of *Stare Decisis* 23

1. The Dissent Below 23

2. *Stare Decisis* 25

III. THE PRACTITIONERS' PERSPECTIVE 28

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Aleman v. Chugach Support Services, 485 F.3d 206 (4th Cir. 2007) 23
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11
Andrews v. Lakeshore Rehabilitation Hospital, 140 F.3d 1405 (11th Cir. 1998) 23
Burlington Northern and Santa Fe Ry. Co., v. White, 126 S. Ct. 2405 (2006) 22
Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990) 16
Choudhury v. Polytechnic Institute of New York, 735 F.2d 38 (2d Cir. 1984) 15
Dickerson v. United States, 530 U.S. 428 (2000) 27
Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006) 25
Foley v. University of Houston System, 355 F.3d 333 (5th Cir. 2003) 23
Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982) 15
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 15
Hart v. Transit Management of Racine, Inc., 426 F.3d 863 (7th Cir. 2005) 3
Hawkins v. 1115 Legal Service Care, 163 F.3d 684 (2d Cir. 1998) 23
International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 27
Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) ..... *passim*
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) ..... *passim*
Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369 (2004) 19, 28, 29
Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997) 23
Landgraf v. USI Film Products, 511 U.S. 244 (1994) 16
London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981) 15
Manatt v. Bank of America, N.A., 339 F.3d 792 (9th Cir. 2003) 23
Miranda v. Arizona, 384 U.S. 436 (1966) 28
O'Neal v. Ferguson Construction Co., 237 F.3d 1248 (10th Cir. 2001) 23
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) ..... *passim*
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 18
Runyon v. McCrary, 427 U.S. 160 (1976) ... *passim*
Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981), *modified on other grounds*, 657 F.2d 962 (1981), *cert. denied*, 454 U.S. 1064 (1982) 15
Sherman v. Burke Contracting Inc., 891 F.2d 1527 (11th Cir. 1990) 16
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) ..... *passim*
Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) 13

TABLE OF AUTHORITIES—Continued

Page

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 19
Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977) 15

FEDERAL STATUTES

20 U.S.C. § 1681 21
28 U.S.C. § 1658 28
42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1981a 17
42 U.S.C. § 1982 ..... *passim*
42 U.S.C. § 2000e *et seq.* ..... *passim*
Civil Rights Act of 1866, 14 Stat. 27 ..... 5, 9, 10, 24
Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1072 ..... *passim*

MISCELLANEOUS

The Federalist, No. 78 26
H. Rep. 102-40(II) (1991) 20
S. Rep. No. 101-315 (1990) 20

INTEREST OF *AMICUS CURIAE* [1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of practitioners who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 lawyers working on behalf of clients with claims of unlawful treatment in the workplace. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of employees.

Of particular importance in this case, NELA's members have a wealth of experience representing individuals under Title VII and 42 U.S.C. § 1981. In so doing, they have been guided by, and relied on, the unanimity among eight Courts of Appeals in interpreting this Court's decisions and the Civil Rights Act of 1991 as providing that retaliation is covered by § 1981.

STATUTE AT ISSUE

42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, provides:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certifies that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT

Respondent, an African American who served as an associate manager in a Cracker Barrel restaurant owned by petitioner, sued petitioner under Title VII and 42 U.S.C. § 1981 after he was fired. The district court held the Title VII claims were procedurally barred (a ruling which was not appealed) and granted summary judgment on the § 1981 claims, one of which alleged the firing was taken in retaliation for respondent's complaints of racial discrimination.

On appeal to the Seventh Circuit, Judge Williams (joined by Judge Posner) held that § 1981 embraces retaliatory conduct, relying principally on this Court's decisions in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board*

of Education, 544 U.S. 167 (2005), as well as § 101 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1072, which responded to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The court also held that summary judgment was improper as to the § 1981 retaliation claim and overruled *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), which held that § 1981 did not protect a non-victim of discrimination who suffered retaliation for complaining about bias suffered by others. Joint Appendix (JA) 117-159.

Chief Judge Easterbrook dissented, arguing that *Jackson* could be distinguished and that *Sullivan* would not be decided the same way today. JA 159-166.

SUMMARY OF ARGUMENT

Section 1981 bars retaliation against workers for complaining about discrimination based on race or color. This issue has been settled since enactment of the Civil Rights Act of 1991—and certainly since the Court's decision three terms ago in *Jackson v. Birmingham Board of Education*. Practitioners from both the plaintiffs' and defense bar share this view, with the result that *nearly half* of all § 1981 claims involve retaliation. *See* Appendix bound with this brief at 3.

This appreciation of the statute's meaning is grounded on the Court's decisions as well as the 1991 Civil Rights Act. Two of those precedents—*Jackson* and *Sullivan v. Little Hunting Park*—would need to be overruled in order to hold that § 1981 does not cover retaliation. *Stare decisis* is not an absolute, but it is a generally trustworthy principle, and it should govern here.

Contrary to the fears expressed by petitioner and its *amici*, Title VII's processes will not wither away if the judgment below is affirmed. Rather, the Seventh Circuit simply preserved the *status quo* in the lower courts—a *status quo* in which retaliation claims are regularly asserted by § 1981 plaintiffs and in which *nine out of ten* lawsuits (88 percent) with § 1981 allegations are accompanied by claims under Title VII (which means that the plaintiff has exhausted Title VII's administrative process). *See* App. at 3. This high rate of coupling results from a recognition that the Title VII machinery is often useful; hence practitioners advise their clients, where possible, to pursue the Title VII approach as well as keeping the § 1981 option open.

1. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court held that § 1981, which secures the right to "make and enforce contracts" on the same basis as whites, forbids racial discrimination in private sector employment. A year later, in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court confirmed that § 1981 reaches private racial discrimination.

After the Court in 1989 ruled in *Patterson v. McLean Credit Union*, 491 U.S. 164, that § 1981 does not cover conduct that occurs after a contract is formed (such as racial harassment), Congress responded by amending § 1981 as part of the Civil Rights Act of 1991. The new definition of "make and enforce contracts" makes it clear that § 1981 applies to all manner of postformation conduct, including harassment and retaliation.

In addition, § 1981 not only protects the right to make and enforce contracts, but also the rights "to sue, be parties [and] give evidence." And another

amendment added in the 1991 Act specifies that all § 1981 rights are protected from "impairment"—weakening—not just simple denial. If an employer fires a black worker because he has filed a lawsuit under § 1981 alleging racial discrimination, there is impairment of the right to sue on the same unfettered basis as whites.

2. Before *Patterson*, the Court had given a broad construction to both statutes enacted during Reconstruction under the Thirteenth Amendment's enabling clause—42 U.S.C. §§ 1981 and 1982. The Court considered § 1982 first, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), holding that the statute's ban on racial discrimination in the sale and rental of housing applies to private bias as well as state action. In so ruling, the Court examined the common ancestor of *both* §§ 1981 and 1982—§ 1 of the Civil Rights Act of 1866—and held that Congress in 1866 intended to reach private discrimination in § 1 and had the authority to do so under the enabling clause of the Thirteenth Amendment, in order to eliminate the "badges and the incidents of slavery."

Following *Jones*, the Court held in *Sullivan v. Little Hunting Park* that § 1982 prohibited retaliation against someone for seeking to vindicate the rights protected by § 1982. And in *Runyon v. McCrary*, the Court ruled that § 1981 should be interpreted the same fashion as § 1982, in view of their common origin. So it was no surprise that many circuits held that § 1981 likewise bars retaliatory conduct. Then came *Patterson*, with its narrow reading of § 1981, followed almost immediately by the Civil Rights Act of 1991, in which Congress showed a marked preference for the Court's earlier, broader construction of the statute.

3. Finally, just three terms ago, the Court held in *Jackson v. Birmingham Board of Education* that Title IX's ban on sex discrimination includes a prohibition of retaliation, because retaliating against someone for complaining about sex discrimination is itself a form of sex bias. In so holding, the Court pointed to *Sullivan*, saying that the Court there ruled that retaliation for pressing for the rights secured by § 1982 constituted discrimination on the basis of race.

4. Given the Civil Rights Act of 1991, as well as the Court's precedents, eight Courts of Appeals have all held that § 1981 proscribes retaliation. It is not too much to say that a ruling that retaliation is permitted under § 1981 would necessitate over ruling precedent, most notably *Sullivan* and *Jackson*. But there is no reason here to depart from familiar principles of *stare decisis*.

5. In the Civil Rights Act of 1991, Congress for the first time authorized a damage remedy under Title VII, with damages restricted by statutory caps. Uncapped damages were already available under § 1981, however, and Congress carefully wrote the new damage provision to exclude § 1981 claims from the caps.

This and other aspects of the 1991 Act reflect an affirmative congressional interest in securing § 1981's role as a separate source of relief from racial discrimination. That is, Congress wished to preserve § 1981 as an independent source of protection for the very people whose fate was originally bound up with the Union's in the Civil War—and whose post-war plight prompted passage of major civil rights acts a century apart, in 1866 and 1964.

ARGUMENT

I. THE SCOPE OF THE ISSUE

A memorandum from Dr. Laura Beth Nielsen, an Assistant Professor of Sociology at Northwestern University and a Research Fellow for the American Bar Foundation (ABF), is appended to this brief. In the memo, Dr. Nielsen describes the methodology for, and some results concerning 42 U.S.C. § 1981, from an as yet unpublished study of judicial filings under federal statutes relating to employment, including Title VII and § 1981. The study is jointly commissioned by the National Science Foundation and ABF. App. at 1.

The study analyzes data from 1988 through 2003. Focusing on the six-year period 1998-2003, Dr. Nielsen reports that nearly half of all § 1981 filings (45 percent) include a claim of retaliation. App. at 3.

This does not mean that Title VII's processes have been jettisoned. Far from it. Practitioners appreciate the light that an EEOC investigation may shed on frequently unknown facts, and most welcome the opportunity for early resolution afforded by EEOC's conciliation process. *See* 42 U.S.C. § 2000e-5(b). And if conciliation fails and litigation looms, far better if EEOC elects to carry the water and sue on behalf of the complaining party. *See id.* at (f)(1).

Because EEOC performs valuable services, most practitioners whose clients have § 1981 claims advise them also to file a Title VII charge with EEOC. The result is that the vast majority—88 percent—of judicial filings under § 1981 are accompanied by a claim under Title VII. App. at 3. Only 12 percent

stand alone. There is no danger that Title VII will become a dead letter.[2]

II. SECTION 1981 COVERS RETALIATION UNDER THE COURT'S PRECEDENTS, CONSISTENT WITH THE WILL OF CONGRESS

A. Section 1981 Covers Retaliation under the Court's Precedents Interpreting Thirteenth Amendment Statutes

1. *The Four Significant Thirteenth Amendment Decisions: Jones, Sullivan, Johnson and Runyon*

The Court's modern examination of the two statutes passed under the Thirteenth Amendment's enabling clause—42 U.S.C. §§ 1981 and 1982—began in 1968 with *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409. In *Jones*, the Court considered the claim of a black prospective home buyer, who alleged that a developer had refused to sell him a house because of his race in violation of 42 U.S.C. § 1982, which provides that all citizens "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." In response to the argument that the statute constrains only state action, the Court held that "§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of

---

[2] Section II.B of the *amicus* brief supporting respondent submitted by the Leadership Conference on Civil Rights suggests that the percentage of freestanding 1981 claims is lower than 12 percent and is in fact under one percent. But even the higher figure demonstrates that the overwhelming majority of § 1981 claims are filed together with Title VII allegations and so have traversed the requisite Title VII processes.

property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 413 (emphasis original) (footnote omitted).

In so ruling, the Court reasoned that "[o]n its face . . . § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities." *Id.* at 421 (emphasis original). Examining the statute's history, the Court observed that § 1982 was originally "part of § 1 of the Civil Rights Act of 1866," which was enacted over President Andrew Johnson's veto and which provided:

> That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence*, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. (emphasis added) (ellipses original) (footnotes omitted).[3]

---

[3] The emphasis added to § 1 above highlights language that is the same as in the present day 42 U.S.C. § 1981(a); the Court in

The Court then thoroughly canvassed the legislative history of § 1 of the 1866 Civil Rights Act and concluded that "it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Id.* at 436.

Eighteen months after deciding *Jones*, the Court in 1969 held that § 1982 prohibits retaliatory conduct. In *Sullivan v. Little Hunting Park*, 396 U.S. 229, the white owner of a share in a community recreational corporation sought to assign the share to an African American. The corporation's board refused to approve the assignment because of the prospective assignee's race, and the white share owner protested. The board then expelled him from the corporation.

Both the black would-be assignee and the white share owner sued, invoking § 1982. The Court first held that the black plaintiff stated a § 1982 claim in challenging the board's refusal to approve the assignment. *Id.* at 236-37. Turning to the white share owner's "expulsion for the advocacy of [the black plaintiff's] cause," the Court held that he had standing to contest being "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* at 237.

Since *Sullivan*, there has been no doubt that § 1982 bars retaliation, and the Court recently reaffirmed this point in *Jackson v. Birmingham Board of Education*, 544 U.S. 167: "in *Sullivan* we interpreted a general prohibition on racial dis-

---

Jones noted that § 1981, like § 1982, is "derived from § 1 of the Civil Rights Act of 1866," and that its "terms . . . closely parallel those of § 1982." 392 U.S. at 441 n.78.

crimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* at 176.

Jones noted that §§ 1981 and 1982 share common ancestry and have parallel terminology, *see* 392 U.S. at 441 n.78, so it was foreseeable that the Court would hold, as it did in 1975 in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, that § 1981's prohibition of racial discrimination in the making and enforcing of contracts covers private contracts, specifically contracts of employment. In *Johnson*, the issue was whether filing a Title VII charge with EEOC tolled the statute of limitations for a § 1981 action brought on the same facts. The Court held there was no tolling, because the remedies and procedures of Title VII and § 1981 were entirely separate from, and independent of, one another. On this point, the Court quoted *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974): "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *See* 421 U.S. at 459.

More specifically, the House report on what became the Equal Employment Opportunity Act of 1972 said "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." *Id.* The Senate report contained similar language. *Id.*

Addressing the protections afforded by § 1981, the Court said that the statute

> relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.

Id. at 459-60 (footnote omitted).

The Court was also satisfied that "Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance." *Id.* at 461. Indeed, the absence of conciliation in § 1981 cases, and the possibly detrimental effect on the Commission's compliance program if a § 1981 lawsuit is unsuccessful, are "the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one." *Id.* In these circumstances, the Court was "disinclined . . . to infer any positive preference for one over the other," *i.e.*, Title VII over § 1981. *Id.*

A year after *Johnson*, in *Runyon v. McCrary*, 427 U.S. 160, which did not involve a contract of employment but rather the right of black parents to enter into contracts to send their children to private schools, the Court treated the question of § 1981's application to private conduct as settled. The Court said that it was "now well established that § 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981, prohibits racial discrimination in the making

and enforcement of private contracts," 427 U.S. at 168, explaining that its ruling on § 1982 in *Jones* "necessarily implied that the portion of § 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination." *Id.* at 170.

The Court said that "[t]he applicability of the holding in *Jones* to § 1981 was confirmed" by the decisions in *Johnson v. Railway Express Agency* and *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), *see* 427 U.S. at 171, so "[t]he Court of Appeals' conclusion that § 1981 was . . . violated follows inexorably from the language of that statute, as construed in *Jones*, *Tillman*, and *Johnson*." *Id.* at 173.[4]

The Court also thought it "noteworthy" that in the debate culminating in the Equal Employment Opportunity Act of 1972, Congress "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866 . . . insofar as it affords private-sector employees a right of action based on racial discrimination in employment. * * * There could hardly be a clearer indication of

---

[4] *Tillman* was a challenge to the racially restrictive practices of a recreation association brought under both §§ 1981 and 1982. Rejecting the association's argument that it was a private club, the Court first focused on § 1982 and noted that the association's membership practices were "indistinguishable" from those of the respondent in *Sullivan v. Little Hunting Park*, which the Court had held was not private. 410 U.S. at 438. Turning to the § 1981 claim, the Court said that "[t]he operative language of both § 1981 and § 1982 is traceable to" § 1 of the Civil Rights Act of 1866. *Id.* at 439. "In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied . . . to the claim of [the association] that it is a private club." *Id.* at 439-40.

congressional agreement with the view that § 1981 does reach private acts of racial discrimination." *Id.* at 174-75 (citation omitted) (footnote omitted). The Court ended its discussion of § 1981's reach by saying that, "[i]n these circumstances there is no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes." *Id.* 427 U.S. at 175.

2. *Section 1981 Covers Retaliation under the Court's Thirteenth Amendment Decisions*

Beginning with *Jones* in 1968 and culminating with *Runyon* in 1976, the Court vivified both Thirteenth Amendment statutes, 42 U.S.C. §§ 1981 and 1982. In *Jones*, which focused on § 1982, the Court held that § 1 of the Civil Rights Act of 1866 reached private racial discrimination, so § 1982, simply a codification of part of § 1, also covers conduct in the private sphere.

Since § 1981 likewise had its origins in § 1, the Court in *Runyon* said that *Jones* "necessarily implied" that § 1981 also reaches private racial discrimination. 427 U.S. at 170. And by the time *Runyon* was decided, it was clear in particular that "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Johnson v. Railway Express Agency*, 421 U.S. at 466.[5]

---

[5] *Johnson* dealt with alleged discrimination by a private company, but § 1981 also applies to "[a] union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of

Finally, the Court in *Sullivan v. Little Hunting Park* held that § 1982 "cover[s] retaliation against those who advocate the rights of groups protected by [its] prohibition" on racial discrimination in housing. *Jackson v. Birmingham Board of Education*, 544 U.S. at 176. Given the common derivation of 42 U.S.C. §§ 1981 and 1982 from a single Reconstruction statute, and given as well the identical operative, rights-conferring language of the two laws—those protected "shall have the same right . . . as is enjoyed by white citizens"—it is small wonder that Courts of Appeals in the 1970's and 1980's held that § 1981 also covers retaliation.[6]

B. In the Civil Rights Act of 1991, Congress Rejected *Patterson*'s Holding Narrowing the Reach of § 1981

1. *Patterson*

In *Patterson v. McLean Credit Union*, 491 U.S. 164, the Court first considered whether to overrule *Runyon*'s holding that § 1981 reaches private conduct. Principles of *stare decisis* counseled against overruling, though, so *Runyon* was not disturbed. *See id.* at 171-75.

One of the plaintiff's claims was an allegation of racial harassment, which the Court held was not

---

its white membership." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987).

[6] *See Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 42-43 (2d Cir. 1984); *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981), *modified on other grounds*, 657 F.2d 962 (1981), *cert. denied*, 454 U.S. 1064 (1982); *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981).

covered by § 1981. More generally, the Court ruled that the statute did not apply to conduct after the contract was formed—in a contract of employment, after the initial hire (except for promotions where "the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer," *id.* at 185). The Court felt that such "postformation conduct" was beyond the reach of § 1981 because of the "statute's limitation to the making and enforcement of contracts." *Id.* at 180. In addition, "[w]here conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites." *Id.* at 181.

2. *The Sweep of the 1991 Civil Rights Act in Overriding Patterson*

In the immediate aftermath of *Patterson*, a few circuits held that § 1981 did not permit claims of retaliation.[7] But the *Patterson* era was short-lived. The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1072, included statutory responses to several of the Court's decisions with which Congress was dissatisfied, including *Patterson*. *See Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

In particular, § 101 of the Act amended § 1981 to make it clear that the statute covers all manner of postformation conduct by adding two new subsections—(b), which defines "the term 'make and enforce contracts' [as] includ[ing] the making, performance, modification, and termination of con-

---

[7] *See, e.g., Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990).

tracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and (c), which provides in part that "[t]he rights protected by this section are protected against *impairment* by nongovernmental discrimination" (emphasis added), thus making it clear that the statute is concerned with the impairment—weakening—of the rights enumerated, not just their denial (as well as forestalling any future attempt to overrule *Runyon*).

In addition to being the focus of § 101 of the 1991 Act, § 1981 also figures prominently in § 102, which for the first time authorized damages in Title VII cases but capped damage awards based on the size of the defendant, with a maximum of $300,000 available against defendants employing more than 500 people.[8] Congress wrote § 102 carefully to insure it would *not* limit relief in § 1981 cases, where uncapped damages were already available.[9] Thus subsection (a)(1) in § 102 authorizes damages in Title VII cases of intentional discrimination, "provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. § 1981)." And subsection (b)—which sets forth the various damage caps—provides at subsection (4) that "[n]othing in this section shall be construed to limit the scope of, or the relief available under" § 1981.

---

[8] Section 102 is codified (somewhat confusingly) at 42 U.S.C. § 1981*a*.

[9] *See Johnson v. Railway Express Agency*, 421 U.S.at 460 ("An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.").

Sections 101 and 102 together show that the Court's assumption in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 306-07 (1994)—"that § 101 reflects congressional disapproval of *Patterson*'s interpretation of § 1981"—is accurate. Indeed, *both* §§ 101 and 102 of the 1991 Civil Rights Act bespeak dissatisfaction with *Patterson*, as well as an affirmative congressional interest in securing § 1981's role as a separate source of relief from racial discrimination, entirely independent of Title VII.

The Court in *Patterson* declined to view § 1981 "as a general proscription of racial discrimination in all aspects of contract relations," 491 U.S. at 181, and expressed reluctance "to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.* But §§ 101 and 102 in the Civil Rights Act of 1991 reflect a clear congressional choice precisely in favor of construing § 1981 as "a general proscription of racial discrimination in all aspects of contract relations," regardless of the impact on Title VII's remedial scheme—that is, a return to *Johnson*'s caution against "infer[ring] any positive preference for one [statute] over the other." 421 U.S. at 461. In these circumstances, it is unsurprising that coverage of retaliatory conduct is evident from the statutory text.

3. *Retaliation Is Covered by the Text of the 1991 Amendments to § 1981*

Respondent argues that retaliation must not be covered by the amended § 1981, because the text of the statute does not contain the word. But "harassment" does not appear in the text, either, and there is no doubt that racial harassment is prohibited by § 1981 as amended, because Congress wished to

overturn *Patterson*, which dealt with harassment. *See, e.g., Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), a § 1981 case in which "plaintiffs alleged that they were subjected to a racially hostile work environment," *id.* at 372, and it was "undisputed that [they] have alleged violations of the amended statute." *Id.* at 373.

The plaintiffs in *Donnelley* also alleged wrongful termination, and "termination"—unlike "harassment"—is included in the statutory text, as the Court pointed out by quoting new subsection (b) of the statute. *Id.* The Court also quoted the language in subsection (b) that further defines "make and enforce contracts" as including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* This is the only text that covers harassment, but it covers it nicely, since an employee who is harassed because of race is denied the full "enjoyment . . . of the contractual relationship." In the same fashion, a worker is deprived of enjoyment of the contractual relationship if retaliation follows a complaint about racial discrimination in contract administration.

Congress expected the courts to rely on legislative history in construing the Civil Rights Act of 1991, and it added a proviso in § 105 (the part of the Act responding to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)) which prohibited use of any history other than an interpretive memorandum appearing in the Congressional Record "in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice." *See* § 105(b). There are no restrictions on use of legislative history to interpret any other provisions of the Act.

Given the congressional expectation on judicial use of the 1991 Act's legislative history as an interpretive aid, it is noteworthy that the relevant committee reports of both houses of Congress say, in the words of the Senate, that the list of covered acts in § 1981's new subsection (b) "is intended to be illustrative rather than exhaustive." S. Rep. No. 101-315 (1990) at 58. In addition, the House report says that the list "would include, but not be limited to, claims of harassment . . . [and] retaliation." H. Rep. 102-40 (II) (1991) at 37.

Subsection (a) of § 1981—the original statute—is also relevant here, when considered in light of subsection (b)'s inclusion of postformation conduct and new subsection (c)'s declaration that the enumerated rights are protected from "impairment," not just absolute denial. Analysis of § 1981 typically focuses on the right to make and enforce contracts, but § 1981(a) also safeguards the rights "to sue, be parties [and] give evidence" on the same basis as whites. An employer who retaliates against an employee for filing a § 1981 lawsuit has certainly impaired the right to sue in the same unfettered manner that Congress rightly believed was enjoyed by whites. And since filing a Title VII charge with EEOC or lodging an internal complaint of bias are frequently precursors to more formal legal action, an employer who retaliates because of such activity also impairs rights secured by § 1981.

C. *Jackson* Confirms that § 1981 Covers Retaliation

Concurring in *Runyon*, Justice Powell said he agreed with the Court that the "considered holdings [of *Jones v. Mayer* and *Sullivan v. Little Hunting*

Park] with respect to the purpose and meaning of § 1982 necessarily apply to both [§§ 1981 and 1982] in view of their common derivation." 427 U.S. at 187. In *Sullivan*, the Court applied § 1982 to retaliatory conduct. And in the Civil Rights Act of 1991, Congress rejected the Court's narrow reading of § 1981 in *Patterson* and added expansive language to the statutory text. It was clear to the Courts of Appeals prior to *Patterson* that § 1981, like § 1982, barred retaliation, and that point was solidified by the 1991 Act.

The Court dispelled any doubts on this score with its 2005 decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, which construed Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, which prohibits sex discrimination by recipients of federal education funding. The issue in *Jackson* was whether a ban on retaliatory conduct was encompassed in Title IX's prohibition of sex discrimination, and the Court held it was.[10]

The Court explained that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *id.* at 173; *i.e.*, it is "discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 174. It was also important for the Court that Title IX was enacted three years after its decision in *Sullivan v. Little*

---

[10] Title IX's bar to discrimination is contained in 20 U.S.C. § 1681(a): "Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

Hunting Park, which "interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* at 176 (footnote omitted). In *Jackson*, "[r]etaliation for [plaintiff's] advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,' just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." *Id.* at 176-77.

Jackson added another, straightforward reason why § 1981 bars retaliation: if "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," 544 U.S. at 173, then retaliation because someone has complained of racial discrimination is likewise a form of intentional racial discrimination.[11]

These two lines of argument—one based on analysis of the Court's decisions in cases involving the two Thirteenth Amendment statutes, including the congressional response to *Patterson* in 1991, the other grounded in *Jackson*'s understanding that retaliation for complaining about discrimination is itself a form of the discrimination complained about—are both anchored by this Court's decisions. Each is powerful in its own right. So it is not surprising that, in

---

[11] In *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006), the Court said that "[t]he substantive provision [of Title VII] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Jackson* held that if that conduct protested bias against a particular status, then punishing someone for that conduct was equivalent to punishing for the status.

addition to the court below, the other seven circuits to address the question following passage of the Civil Rights Act of 1991 have *all* held that § 1981 prohibits retaliation.[12]

D. Considerations of *Stare Decisis*

1. *The Dissent Below*

Even if the statutory text were less clear, *Sullivan* and *Jackson*, both singly and together, block any effort to say that § 1981 does not reach retaliation. Dissenting below, Chief Judge Easterbrook therefore sought to distinguish *Jackson*, saying first that

---

[12] *See Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 693 (2d Cir. 1998) ("We remain of the view, in light of the broad sweep of § 1981(b), that a retaliation claim may be brought under § 1981."); *Aleman v. Chugach Support Services*, 485 F.3d 206, 213 (4th Cir. 2007) ("Supreme Court . . . precedent . . . hold[s] retaliation to be a form of differential treatment subsumed in the anti-discrimination language of Section 1981," citing *Jackson* and *Sullivan*); *Foley v. University of Houston System*, 355 F.3d 333, 338-39 (5th Cir. 2003) (plaintiffs "contend that the right to be free from retaliation for exercising rights protected by § 1981 was clearly established by the Civil Rights Act of 1991 * * * we agree."); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997) ("Like the substantive claim of racial discrimination, a claim of retaliation, in a racial discrimination context, can violate both Title VII and 42 U.S.C. § 1981."); *Manatt v. Bank of America, N.A.*, 339 F.3d 792, 800-01 (9th Cir. 2003) (recognizing that plaintiff had stated a § 1981 claim where she "contend[ed] that the [defendant] retaliated against her for complaining to her supervisor and to human resources about racial discrimination"); *O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1258 (10th Cir. 2001) (affirming damage award above the cap for Title VII damages for a § 1981 retaliation claim); *Andrews v. Lakeshore Rehabilitation Hospital*, 140 F.3d 1405, 1412-13 (11th Cir. 1998) ("post-1991 retaliation claim brought by [plaintiff] is cognizable under the amended section 1981").

Jackson construed the term "discrimination" in Title IX, but that § 1981 does not contain that term: "The word 'discriminate' does not appear in § 1981." JA 159. This is just wrong. Subsection (c) of § 1981 (added by the Civil Rights Act of 1991) provides that "[t]he rights protected by this section are protected against impairment by nongovernmental *discrimination*" (emphasis added). In any event, the Court has never doubted that § 1981 is concerned with racial discrimination; *see Johnson*, 421 U.S. at 460 ("§ 1981 affords a federal remedy against discrimination in private employment on the basis of race"); *Patterson*, 491 U.S. at 172 (reaffirming that "§ 1981 prohibits racial discrimination in the making and enforcement of private contracts.").

As to *Sullivan*, the dissent plainly thinks it was wrongly decided, saying that "*Sullivan* engaged in a freewheeling 'interpretation' of § 1982," JA 164, and "ignored the language" of the statute. *Id.* "There has been a sea change in interpretive method between *Sullivan* and today," *id.* at 165, however, so *Sullivan*'s construction of § 1982 should not be a model for "§ 1981, its neighbor." *Id.* at 164. But §§ 1981 and 1982 are not mere "neighbors" in the code. These two statutes were originally part of the same law—§ 1 of the Civil Rights Act of 1866—and this is why the Court has instructed that they should be interpreted in the same fashion.

Chief Judge Easterbrook also said that judges should adhere to what he called "the holding of *Patterson*": when interpreting § 1981, courts "must consider the effect that [the interpretation] would have on Title VII." JA 161-62. In the Civil Rights Act of 1991, though, Congress rejected this approach, preferring two independently firing, fully loaded

weapons to combat racial discrimination in employment, even at the expense of Title VII's processes. In such circumstances, some measure of deference to the will of Congress is called for.[13]

2. *Stare Decisis*

It would be extraordinarily difficult to say that § 1981 lacks protection against retaliation, without overruling either or both *Sullivan* and *Jackson*. But overruling either would abridge the principle of *stare decisis* without good cause.

In *Patterson*, the first issue addressed was whether to overrule *Runyon v. McCrary*'s holding that § 1981 covers private conduct, in a setting in which "[s]ome Members of th[e] Court believe[d] that *Runyon* was decided incorrectly, and others consider[ed] it correct on its own footing." 491 U.S. at 171-72. The Court consequently discussed *stare decisis* at some length, saying it is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and pre-

---

[13] The dissent repeatedly cites the Court's unanimous decision in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), in which the black owner of a construction company sought to invoke § 1981 on his own behalf, even though all contracts at issue were (or would have been) with his company, not himself personally. The Court held that § 1981 did not apply, for the statute, which "offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, *so long as the plaintiff has or would have rights under the existing or proposed contractual relationship*," 546 U.S. at 476 (emphasis added), did not assist a plaintiff who neither had, nor would have had, contract rights. This is an important principle, but it has nothing to do with claims of retaliation by those who in fact "have rights under the existing or proposed contractual relationship."

serving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Id.* at 172, *quoting* The Federalist, No. 78.[14]

The Court noted in *Patterson* that it had previously "held that 'any departure from the doctrine of *stare decisis* demands special justification,'" *id.* (citation omitted), and that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 172-73.

The Court concluded that there was "no special justification" for overruling *Runyon*, *id.* at 173, such as "the intervening development of the law," *id.*, or that the decision is "unworkable" or "poses a direct obstacle to the realization of important objectives embodied in other laws," *id.*, or had become outdated, as experience has shown it to be "'inconsistent with the sense of justice or with the social welfare.'" *Id.* at 174, quoting the concurring opinion by Justice

---

[14] The Chief Justice echoed these sentiments on the first day of his confirmation hearing, saying "Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath." *Confirmation Hearing On The Nomination Of John G. Roberts, Jr. To Be Chief Justice Of The United States before the Senate Comm. On The Judiciary*, 109th Cong. at 55 (2005) (statement of nominee) (reprint Serial No. J-109-37). Later, in response to questions from Senator Specter, the Chief Justice said, "I would point out that the principle [of *stare decisis*] goes back even farther than Cardozo and Frankfurter. Hamilton, in Federalist No. 78, said that, 'To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents,'" *id.*, at 141-142 (questions by Chairman Specter).

Stevens in *Runyon*, 427 U.S. at 191, which in turn quoted Justice Cardozo. Indeed, on this latter count, *Runyon* was hardly outdated: "To the contrary, *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." 491 U.S. at 174.

There is no "special justification" for overruling either *Sullivan* or *Jackson*. There has been no "the intervening development of the law" that suggests the necessity of overruling; neither decision has proved unworkable or poses an obstacle to the realization of the objectives of other laws; and neither is outdated from the perspective of social mores. As with *Runyon*, the reverse is true.

Sullivan and *Jackson* should remain good law. And if they do, a ruling that retaliation is not covered by § 1981 is, as Justice Rehnquist said in another context, "virtually foreclosed." *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976).[15]

---

[15] Justice White dissented in *Runyon v. McCrary*, 427 U.S. at 192, and among other things criticized the majority's reliance on *Johnson v. Railway Express Agency*, labeling *dictum Johnson*'s statement that § 1981 covers private discrimination. *See id.* at 213. Justice Rehnquist joined the dissent. Six months later, Justice Rehnquist wrote the *I.U.E. v. Robbins & Myers* decision, holding that a worker's resort to a collective bargaining agreement's grievance machinery does not toll Title VII's time limits. The decision cited *Johnson* extensively and quoted from it liberally, including setting forth at length the passage saying, "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time consuming procedures of Title VII."

III. THE PRACTITIONERS' PERSPECTIVE

Especially after *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, which held that many § 1981 claims are subject to the four-year statute of limitations in 28 U.S.C. § 1658, it is usually relatively easy to coordinate Title VII's and § 1981's timing requirements, so as to permit claims under both statutes to be packaged in a single complaint. That is, the Title VII charge in most cases must be filed within 300 days of the event complained of; this gives EEOC more than three years to complete its work if the prospective plaintiff also wishes to rely on § 1981.[16]

On occasion, though, it is either impossible or impractical to coordinate matters subject to Title VII and § 1981, as when the Commission takes an especially long time to complete its processes, or when it acts quickly and sends a notice of right to sue—thereby triggering a 90-period for filing suit, 42 U.S.C. § 2000e-5(f)(1)—and the person aggrieved is awaiting the completion of a nonjudicial proceeding, such as an arbitration under a collective bargaining agreement. These situations do not happen often—

---

429 U.S. at 239, *quoting Johnson*, 421 U.S. at 466. This is a homely example of Justice Rehnquist's fealty to precedent, something best exemplified when Chief Justice Rehnquist wrote for the Court in *Dickerson v. United States*, 530 U.S. 428 (2000), which declined to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966).

[16] Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1), imposes a 180-day deadline on charge filing, but that period is increased to 300 days in jurisdictions having agencies "with authority to grant or seek relief" concerning the charging party's allegations, *id.*, and today there is such an agency in virtually every large jurisdiction.

only 12 percent of § 1981 claims stand alone—but roughly half of these involve retaliation (using the 45 percent figure reported by Dr. Nielsen, *see* App. at 3). If § 1981 does not cover retaliation, such individuals, who reasonably regarded the question whether § 1981 reaches retaliation as settled, will have no remedy. The Court has suggested that "preserving settled interests" is a factor to be considered when statutes are construed, *Donnelley*, 541 U.S. at 382, and these people would find their interests disrupted by a ruling that § 1981 does not reach retaliatory conduct.

A much larger group would also see legitimate expectations thwarted. Whether or not linked to Title VII, 45 percent of all § 1981 claims include an allegation of retaliation. In § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Congress expressly exempted claims under § 1981 from caps on damages under Title VII, underscoring the broader congressional goal of relieving § 1981 claims of all Title VII requirements. In these circumstances, those § 1981 plaintiffs with retaliation claims—like all other § 1981 plaintiffs—reasonably thought their damages would not be subject to caps, either. Some have in all likelihood formulated settlement positions and engaged in bargaining with that in mind.

There is no warrant to unsettle the expectations of § 1981 retaliation claimants. On the contrary, the Civil Rights Act of 1991, as well as the Court's precedents, establish that § 1981 covers retaliation.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

STEFANO G. MOSCATO
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

* Counsel of Record

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
TAMMANY M. KRAMER
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

Counsel for Amicus Curiae

APPENDIX

APPENDIX A

To: Tammany M. Kramer
Heller, Huron, Chertkof, Lerner, Simon & Salzman, P.L.L.C.
1730 M St., NW—Suite 412
Washington, DC 20036

Fr: Laura Beth Nielsen, J.D., Ph.D
Research Fellow, American Bar Foundation
Assistant Professor of Sociology, Northwestern University

Da: December 20, 2007

Re: Study of Employment Civil Rights Claims

Method

The principal quantitative data analyzed here were collected through a research design that followed Donohue and Siegelman (Donohue & Heckman 1997; Donohue & Siegelman 1991; 1995; Siegelman & Donohue 1990). The project design was peer-reviewed and funded by the National Science Foundation and the American Bar Foundation.

We drew random samples of all federal employment civil rights cases from seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco filed between 1988 and 2003. These districts contain about 20% of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. The sample was drawn from the list of all civil employment discrimination cases filed in these districts from 1988 to 2003 compiled by the Administrative Office of the U.S. Courts (AOUSC). 300 cases were randomly selected from each of these districts over the time period to yield a

sample of 2100 cases. Given our knowledge of the universe from which the sample was drawn, it is possible for us to assign sampling weights by district. The analyses reported here are not weighted by geographic region. We included open cases in the overall sample, but only examine closed cases (n=1805) in this report.

We developed an extensive coding form and trained teams of coders for each site. The same data collection manager supervised and trained coders in each location. 10% of the cases were coded independently by different coders to allow for tests of intercoder reliability. We achieved reliability coefficients of 90% across double coded items. These measures indicate that the coding of the cases was highly reliable.

Your Questions

a) How many §1981 claims have been filed each year in the 1998- 2003 period?

Of employment civil rights claims[1] filed in federal court between 1998 and 2003, between 16 and 26% included a §1981 claim.

	% of all employment civil rights claims that include a §1981 claim
1998	17%
1999	16%
2000	20%
2001	26%
2002	23%
2003	17%

[1] Includes everything classified as 442: ADEA, ADA, Tit. VII, § 1981, § 1983, FMLA, PDA, EPA

b) How many of those §1981 claims also had a Title VII claim?

Some 88% of case filings alleging a violation of §1981 also allege a Title VII violation.

c) How many of those Sec. 1981 claims were for retaliation?

Fully 45% of cases alleging a violation of §1981 are for retaliation.

References

Donohue JJ, Heckman J. 1997. Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks. In *Foundations of Employment Discrimination Law*, ed. JJD III, pp. 225-42. New York: Foundation Press

Donohue JJ, Siegelman P. 1991. The Changing Nature of Employment Discrimination Litigation. *Stanford Law Review* 43:983-1033

Donohue JJ, Siegelman P. 1995. The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest/Klein Hypothesis. *Journal of Legal Studies* 24:427

Siegelman P, Donohue JJ. 1990. Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases. *Law & Society Review* 21:165-74

57532a
38PS

No. 06-1431

Supreme Court, U.S.
FILED
JAN 2 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ARIZONA, CONNECTICUT, IOWA, ILLINOIS, MARYLAND, MASSACHUSETTS, MISSOURI, NEVADA, NEW JERSEY, OHIO, OREGON, VERMONT, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
PETER KARANJIA
Special Counsel to the Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record* *Attorneys for Amici Curiae*

(Additional Counsel Listed on Signature Pages)

213243

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does 42 U.S.C. § 1981 provide redress to persons who have suffered retaliation as a result of complaining about race discrimination?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SECTION 1981'S CAUSE OF ACTION ENCOMPASSES CLAIMS OF RETALIATION FOR COMPLAINTS ABOUT RACE DISCRIMINATION	4
A. Retaliation "Impairs" an Individual's Ability to "Make and Enforce Contracts" Within the Meaning of § 1981	4
B. This Court's Precedents Confirm That § 1981 Embraces Claims for Retaliation.	13
C. Excluding Retaliation Claims from § 1981 Would Subvert the Goals of Congress in Enacting, and Expanding the Scope of, the Statute.	16

Contents

	Page
II. SECTION 1981 SHOULD NOT BE CURTAILED BECAUSE OF OVERLAP WITH TITLE VII	20
A. Congress Intended to Create Partially Overlapping Schemes of Liability Under § 1981 and Title VII.	21
B. Reading § 1981 To Encompass Claims for Retaliation Does Not Undermine Title VII.	24
C. There is No Reason to Believe That Plaintiffs Will Bypass Title VII for § 1981.	26
CONCLUSION	27

TABLE OF CITED AUTHORITIES

Page

Cases

Am. Nat'l Red Cross v. S.G.,
505 U.S. 247 (1992) 12

Anthony v. Butler,
38 U.S. 423 (1839) 18

Bd. of County Comm'rs v. Umbehr,
518 U.S. 668 (1996) 25

Burnett v. Grattan,
468 U.S. 42 (1984) 7, 8

Cannon v. Univ. of Chi.,
441 U.S. 677 (1979) 11

Danco Inc. v. Wal-Mart Stores, Inc.,
178 F.3d 8 (1st Cir. 1999) 25

Domino's Pizza, Inc. v. McDonald,
546 U.S. 470 (2006) 9, 10

Dickerson v. United States,
530 U.S. 428 (2000) 23

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992) 12

Cited Authorities

Page

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 3, 13, 14

Humana Inc. v. Forsyth,
525 U.S. 299 (1999) 8

Jackson v. Birmingham Board of Education,
544 U.S. 167 (2005) 9, 12, 15, 18

Jett v. Dallas Indep. Sch. Dist.,
491 U.S. 701 (1989) 11

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 7-8, 16

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004) 6

Malhotra v. Cotter & Co.,
885 F.2d 1305 (7th Cir. 1989) 9

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 7

N. Star Steel Co. v. Thomas,
515 U.S. 29 (1995) 18

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) ..... *passim*

Cited Authorities

Page

Perry v. Sindermann,
408 U.S. 593 (1972) 25

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 17, 24

Runyon v. McCrary,
427 U.S. 160 (1976) 6, 15, 22

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) ..... *passim*

Salinas v. United States,
522 U.S. 52 (1997) 7

Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973) 15

United States v. Wiltberger,
18 U.S. 76 (1820) 18

Federal Statutes

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1981(a) 24

42 U.S.C. § 1981(b) 6, 24

42 U.S.C. § 1982 .....7, 11, 15

Cited Authorities

Page

42 U.S.C. § 2000e 24

42 U.S.C. § 2000e-2 .....11, 24, 27

42 U.S.C. § 2000e-3 .....11, 24

42 U.S.C. § 2000e-5 26

42 U.S.C. § 2000e-9 26

Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 17

Civil Rights Act of 1866, 14 Stat. 27 ..... *passim*

Legislative History

H.R. Rep. No. 102-40(II)(1991), *reprinted in* 1991 U.S.C.C.A.N. 549 6

H.R. Rep. No. 102-40(I)(1991), *reprinted in* 1991 U.S.C.C.A.N. 549 7

H.R. Rep. No. 101-315 (1990) 24

Page

Miscellaneous

Black's Law Dictionary (6th ed. 1990) 8

Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18 (2005) 19

Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801 (2006) 19

Webster's New International Dictionary (3d ed. 1981) 8

INTEREST OF AMICI CURIAE

At stake in this case is the right of citizens to be protected from reprisal when they report unlawful race discrimination that violates 42 U.S.C. § 1981. Section 1981, originally enacted as part of the Reconstruction-era Civil Rights Act of 1866, prohibits the "impairment" of the rights of all citizens to "make and enforce contacts," irrespective of race. In this case, respondent, an African-American employee of a restaurant operated by petitioner, alleged that he was fired because he complained about his supervisor's allegedly racially discriminatory behavior.

Amici States are dedicated to fostering a culture in which citizens feel free to report violations of the civil rights laws to the appropriate authorities. Effective legal protection against retaliation is an integral part of such a culture. The States therefore have a profound interest in ensuring that § 1981 provides protection to those who report discrimination that violates the statute's promise of equal treatment in contractual relationships, without fear of retaliation.

As the chief law enforcement officers of the respective States, the amici attorneys general are also committed to the proper interpretation of civil rights laws, consistent with "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989). In this connection, notwithstanding the existence of state antidiscrimination statutes, the States frequently rely on federal statutes such as § 1981 when acting as

parens patriae. In many cases, § 1981 is the only federal cause of action available to provide redress for private racial discrimination. For example, unlike Title VII of the Civil Rights Act of 1964, § 1981 covers independent contractors and employees of firms with fewer than fifteen employees. The amici States therefore have a strong interest in ensuring that courts give real content to § 1981's guarantee of equal treatment in contractual relationships, including effective protection against retaliation.

SUMMARY OF ARGUMENT

Section 1981 provides redress to parties to contracts, including employees, who suffer retaliation because they complained about race discrimination.

The text of § 1981 broadly prohibits the "impairment" of the right to "enjoy[] . . . all benefits, privileges, terms, and conditions of the contractual relationship" on an equal footing with "white citizens." An employer's retaliation against an employee who complains about race discrimination falls squarely within the terms of the statute, because such reprisal impairs the employee's right to equal treatment in contractual relationships. Furthermore, this impairment is based on race because, as this Court has recognized, retaliation is a form of intentional discrimination, and retaliating against persons because they have complained about race discrimination is itself discrimination "based on race."

While the text of § 1981 does not include the word "retaliate," no such magic words are required for the

statute to be fairly construed as providing redress for retaliation. Petitioner's contrary argument, which emphasizes the explicit retaliation provisions in various modern antidiscrimination statutes, overlooks the fundamental difference in text and structure between such statutes and the Reconstruction-era Civil Rights Act from which § 1981 derives. Because the text of § 1981 indicates that its long-recognized cause of action encompasses claims alleging retaliation, this reading of the statute does not involve "implying" any new cause of action or "reading into" the text of the statute any novel rights.

This Court's longstanding precedent, coupled with the historical context surrounding the enactment of § 1981, further compel the conclusion that the broad terms of § 1981 encompass a claim for retaliation. In particular, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), establishes that obstruction of employees' efforts to obtain redress for discrimination is actionable under § 1981, even when the obstruction is motivated not by the employees' race but rather by the racial nature of their complaint.

Reading § 1981 to provide redress for retaliation will not cause plaintiffs to circumvent the strictures of Title VII, because proceeding under Title VII offers plaintiffs the advantages of the U.S. Equal Employment Opportunity Commission's administrative process. There thus is no reason to believe that plaintiffs alleging retaliation will generally bypass Title VII in favor of § 1981.

ARGUMENT

I. SECTION 1981'S CAUSE OF ACTION ENCOMPASSES CLAIMS OF RETALIATION FOR COMPLAINTS ABOUT RACE DISCRIMINATION

A. Retaliation "Impairs" an Individual's Ability to "Make and Enforce Contracts" Within the Meaning of § 1981.

Claims of retaliation for complaints about race discrimination fall within the broad terms of § 1981, because an employer that retaliates against an employee who has complained about race discrimination has "impaired" that employee's ability to "make and enforce contracts" — which includes the right to "enjoy[] . . . all benefits . . . of the contractual relationship" — on an equal footing with "white citizens."

1. The current text of § 1981(a), which is essentially the same as its precursor in the Civil Rights Act of 1866, states in relevant part that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."[1]

---

1. The current text of § 1981 provides in full:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal

(Cont'd)

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this Court held that the first aspect of § 1981(a)'s guarantee of equal rights ("the same right . . . to make . . . contracts") extended only to the formation of a contract, but not to "postformation conduct" such as workplace harassment or a discriminatory termination. *Id.* at 177.[2] "In 1991, however, Congress responded to

(Cont'd)

> benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

2. The *Patterson* Court held that the second aspect of the equal rights guarantee ("the same right . . . to . . . enforce contracts") embraced "protection of a legal process, and of a right of access to legal process, that will address and resolve contract-

(Cont'd)

Patterson by adding a new subsection to § 1981 that defines the term 'make and enforce contracts' to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 373 (2004) (quoting 42 U.S.C. § 1981(b)). This legislative amendment "overturned *Patterson*" and "enlarged the category of conduct that is subject to § 1981 liability." *Jones*, 541 U.S. at 383 (citation and quotation marks omitted).

2. The 1991 amendment also added to the statute a new subsection (c), not discussed by petitioner or its amici. Subsection (c) provides, under the heading "Protection against impairment," that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). Subsection (c) was intended to codify this Court's holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that § 1981 covers both private and governmental discrimination. *See* H.R. Rep. No. 102-40(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731. And because Congress was at the same time expanding the conduct prohibited by the statute, Congress chose the comprehensive term "impairment" ("[t]he rights protected by this section are protected against impairment") to describe the broad scope of the conduct prohibited by subsection (b),

---

(Cont'd)

law claims without regard to race." *Patterson*, 491 U.S. at 177. The Court specifically noted that this right also extended to "wholly private efforts to impede access to the courts or *obstruct* nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* (emphasis altered).

including the postformation conduct previously excluded by *Patterson*.[3]

The statute's expansive language commands a liberal interpretation. As this Court admonished in the context of § 1981's companion provision, 42 U.S.C. § 1982, which is likewise derived from § 1 of the Civil Rights Act of 1866, "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, . . . from which § 1982 was derived." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). Or, as the Court noted in discussing a different statute in *Salinas v. United States*, 522 U.S. 52, 56 (1997), the "enactment's expansive, unqualified language" militates against a "narrowing construction." This basic principle of statutory construction applies here because the Civil Rights Acts are "characterized by broadly inclusive language. They do not limit who may bring suit, [and] do not limit the cause of action to a circumscribed set of facts . . . ." *Burnett v. Grattan*, 468 U.S. 42, 50 (1984); *see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976) (noting the "broad terms" of the 1866 Act); *Jones v. Alfred H. Mayer Co.*,

---

3. As the court below recognized, the report of the House Committee on Education and Labor also indicates that the committee understood that "retaliation" would be covered by the 1991 revisions to the statute. *See* H.R. Rep. No. 102-40(I), at 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630 ("the list set forth in [§ 1981(b)] is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring.") (emphasis added).

392 U.S. 409, 437 (1968) (according § 1981 "a sweep as broad as its language") (citation and quotation marks omitted).

The text of § 1981 neither "limit[s] the cause of action" provided thereunder "to a circumscribed set of facts," *Burnett*, 468 U.S. at 50, nor limits the cause of action to a specific legal theory (such as one for "discrimination" rather than "retaliation"). This is not surprising in a Reconstruction-era statute that, in contrast with more detailed modern legislation like Title VII, provides a sweeping definition of a right to equal treatment and broadly proscribes the "impairment" of that right. That being so, the most natural construction of the statute's expansive language encompasses retaliation claims. An employer that retaliates against an employee who complains that he is a victim of race discrimination in the employment relationship "impair[s]" that employee's ability to "make and enforce contracts" — *i.e.*, the right to "enjoy[] . . . all benefits . . . of the contractual relationship" — on an equal footing with "white persons," and such impairment therefore violates § 1981. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999) ("[t]he dictionary definition of 'impair' is 'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'") (quoting *Black's Law Dictionary* 752 (6th ed. 1990)); *Webster's New International Dictionary* 1131 (3d ed. 1981) (defining "impair" as "to make worse: diminish in quantity, value, excellence, or strength" and to "do harm to").

Retaliating against someone because he or she has complained about race discrimination (particularly

where, as here, the victim of the retaliation was also a victim of the alleged initial discrimination) assuredly diminishes, and thus impairs, that person's right to enjoy all the incidents of the contractual relationship irrespective of race. *Cf. Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989) (Posner, J.) (discussing pre-1991 text of § 1981). Such a violation is actionable under the statute because "[s]ection 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination *impairs* an existing contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) (emphasis added).

3. While the "impairment" of the contractual relationship must of course be related to race, it is settled that retaliation is a species of discrimination. As this Court recently made clear in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173-74 (2005), retaliation against a person because that person has complained about unlawful discrimination is simply "another form" of "intentional" and unlawful discrimination. Although the *Jackson* Court was addressing sex (rather than race) discrimination in the context of liability under Title IX (rather than § 1981), its reasoning applies with full force here. "[R]etaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 173-74.

Even apart from *Jackson*, the argument that § 1981 excludes retaliation claims does not respect the statute's expansive language prohibiting the "impairment" of the right to equal treatment in contractual relationships

irrespective of race. While the initial discriminatory act must of course be "based on race," *see Patterson*, 491 U.S. at 176-77; *Domino's Pizza*, 546 U.S. at 474, nothing in the text of § 1981 suggests that the concomitant act of retaliation must itself be motivated by the *complainant's* race. It is sufficient that the retaliation responds to a complaint of race discrimination, and in that sense, is "based on race." This establishes a nexus between the subject matter of the complaint (race discrimination) and the retaliatory act that flows from the nature of the complaint (i.e., an act of retaliation "based on" a prior complaint *about race discrimination*). Whether or not other statutes addressing discrimination also encompass retaliation, the broad and general language of § 1981 does so.

4. Petitioner and its amici are wrong to suggest that construing § 1981 to encompass a claim of retaliation for complaints about race discrimination necessarily involves "implying" a non-existent right (Brief of Amicus Curiae the Chamber of Commerce of the United States ("Chamber of Commerce Amicus Br.") at 17), "creating a cause of action . . . out of whole cloth" (Pet. Br. at 42), or "read[ing] into" the text of the statute a protection that does not exist (Brief of Amici Curiae the Equal Employment Advisory Council and National Federation of Independent Business Legal Foundation ("EEAC Amicus Br.") at 7). To portray the issue in this manner is merely to assume the answer to the very question posed: whether § 1981, fairly construed, provides redress for retaliation based on an individual's complaints about

race discrimination.[4] This mistaken view appears to stem from the erroneous assumption that there must be distinct causes of action for "discrimination" and "retaliation," and that the lack of the word "retaliate" or its equivalent in § 1981 means that such a claim is not cognizable under the statute. *See, e.g.*, Pet. Br. at 12 (noting that "Congress never used the word 'retaliation' or a derivative thereof in its text").

Whatever force such an argument might have in the context of a statute like Title VII that expressly addresses discrimination and retaliation in separate statutory sections (*compare* 42 U.S.C. § 2000e-2(a), *with* 42 U.S.C. § 2000e-3(a)), it makes no sense in the context of § 1981. Section 1981, which speaks broadly of the right to equal treatment in all aspects of the contractual relationship and proscribes the "impairment" of that right, does not by its terms limit itself to a cause of action denominated "discrimination." While the text of § 1981 does not include the word "retaliate," to accord talismanic significance to that fact is to adopt a "'magic

---

4. Petitioner's claim finds no support in Supreme Court cases generally characterizing the private cause of action under § 1981 (like the cause of action under its companion provision, § 1982) as an "implied" remedy. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690, 698 nn.13, 23 (1979) (citing *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), as a case in which the Court "impl[ied]" a cause of action under § 1982). Nothing in those cases suggests that a claim for retaliation is distinctively nontextual or requires a special act of "implication" beyond the original and unchallenged judicial determination that an implied private right of action exists to enforce the rights expressly created by §§ 1981 and 1982. A claim for retaliation stands on the same footing as a claim for any other conduct prohibited by §§ 1981 and 1982.

words' jurisprudence that departs from ordinary rules of English usage." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 265 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy and O'Connor, JJ.); *cf. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 112 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (noting that the Court has "never required any particular magic words" and its task is to "enforce the 'clear and manifest purpose of Congress.'") (citation omitted).

Such a wooden approach to statutory construction would be particularly incongruous when applied to a Reconstruction-era statute that is phrased more in the manner of a broad constitutional norm. In that respect, § 1981 is quite different from the detailed statutory schemes found in many twentieth-century antidiscrimination laws, including Title VII. *Cf. Jackson*, 544 U.S. at 175 (noting that "Title VII . . . is a vastly different statute from Title IX. . . . Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition," while "Title VII spells out in greater detail the conduct that constitutes discrimination in violation of the statute."). For this reason, this is an even easier case than *Jackson*, which addressed Title IX's proscription of "discrimination" on the basis of sex. Title IX, while not as detailed as Title VII, still reflects a modern and specific style of statutory drafting. Section 1981, by contrast, is cast in more sweeping terms. It would therefore be inappropriate to look for the kinds of specifics found in a statute like Title VII when interpreting § 1981.

B. This Court's Precedents Confirm That § 1981 Embraces Claims for Retaliation.

Reading § 1981 to provide redress for retaliation is further supported by two decisions of this Court. In *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), a group of black employees asserted claims of race discrimination, under § 1981 and Title VII, against both their employer and their unions as collective bargaining agents. In a portion of Justice White's opinion joined by five Members of the Court, the Court held that the unions were liable under § 1981 for refusing to process grievances that charged the employer with race discrimination. *Id.* at 668-69. Contending that "the employer would 'get its back up' if racial bias was charged," the unions had effectively "categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks." *Id.* at 668.

The *Lukens* Court agreed that such conduct "intentionally discriminated against blacks seeking a remedy" and held that § 1981, like Title VII, was violated where a union rejected grievances alleging race discrimination "solely because the claims assert racial bias and would be very troublesome to process." *Id.* at 669. Significantly, the Court reached this conclusion even though "there was no suggestion . . . that the Unions held any racial animus against or denigrated blacks generally," *id.* at 668, and the refusal to process grievances apparently stemmed from the nature of the grievance (as about race discrimination) rather than from the race of the complainant. *See id.* at 669 (quoting with approval the district court's statement that "'[a] union

which intentionally avoids asserting discrimination claims . . . is liable under . . . § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.'"); *see also id.* at 681 (Powell, J., concurring in part and dissenting in part) ("[n]either of the courts below specifically found that the Unions were motivated by racial animus").

Accordingly, *Lukens* demonstrates that, even under the narrower (pre-1991) text of § 1981, obstruction of an employee's efforts to obtain redress for race discrimination is actionable under § 1981, and that this is so notwithstanding the fact that the obstruction is *not* motivated by the employee's race, but rather by the racial nature of the employee's complaint. Similarly, an employer's retaliation for an employee's complaints about race discrimination constitutes obstruction based on the racial nature of the employee's complaint.[5] Indeed, given that such obstruction is actionable under § 1981 even when it takes the form of passive conduct (such as the deliberate failure to respond to the grievances at issue in *Lukens*), it surely must be actionable where, as here, it also involves an affirmative act of alleged retaliation — termination of the employee.

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), further buttresses the conclusion that § 1981's cause of action for discriminatory impairments of contractual relationships encompasses claims for retaliation. There,

---

5. Like the unions' failure to process employee grievances about discrimination in *Lukens*, petitioner's agent in this case (district manager William Christensen) apparently failed to conduct any investigation of respondent's complaints about race discrimination. J.A. 119.

the Court held that Sullivan, a white property owner, could sue for retaliation under § 1981's companion provision (§ 1982) even though his underlying complaint was that Freeman, an African-American person, had been subjected to unlawful discrimination. Sullivan was expelled from a corporation that operated recreational facilities for the local community in retaliation for his opposition to the corporation's racially exclusive leasing policy. The Court concluded that Sullivan could sue under § 1982 for his "expulsion for the advocacy of Freeman's cause" because, if that sanction could lawfully be imposed, "then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982" and "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* at 237.

Although *Sullivan* addressed § 1982 rather than § 1981, its holding is no less applicable here. *See Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973) (noting in the context of discrimination claims under § 1981 and § 1982 that, "[i]n light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently") (footnote omitted); *accord Runyon v. McCrary*, 427 U.S. 160, 171 (1976).

Taken together, these precedents, along with *Jackson*, confirm that retaliation for complaints about race discrimination is but a species of intentional discrimination, and that it "impair[s]" the rights secured by § 1981 to enjoy all the benefits of the contractual relationship irrespective of race. Obstructing employees' efforts to obtain redress for discrimination violates

§ 1981, and permitting unchecked retaliation against efforts to vindicate the rights protected by the Act of 1866 "would give impetus" to the very discrimination that the Act was designed to forbid, *Sullivan*, 396 U.S. at 237.

C. Excluding Retaliation Claims from § 1981 Would Subvert the Goals of Congress in Enacting, and Expanding the Scope of, the Statute.

Not only do the text and precedent compel the conclusion that the broad terms of § 1981 cover claims for retaliation, but a contrary reading would subvert the purposes of the legislation. The context surrounding the initial enactment of § 1981, amplified by Congress' explicit declarations of purpose in the legislation that enlarged the statute's reach in 1991, confirm Congress' broad remedial goal in enacting the statute and its intention to eradicate discrimination in contractual relationships.

1. This Court has previously emphasized Congress' intentions during the legislative debates over the enactment of § 1981's source, § 1 of the Civil Rights Act of 1866, to give that statute real content and practical effect. As the Court has described these debates, while "much was said" in both the House and the Senate about "eliminating the infamous Black Codes" that subjected recently freed slaves to multiple disabilities, "like the Senate, the House was moved by a larger objective — that of giving *real content* to the freedom guaranteed by the Thirteenth Amendment." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968) (emphasis added).

For example, Representative Thayer of Pennsylvania noted that the bill that was to become the 1866 Act had the object of "carry[ing] out and guarant[eeing] the reality of [the Thirteenth Amendment]. It [was] to give to it practical effect and force. It [was] to prevent that great measure from remaining a dead letter upon the constitutional page of this country." *Id.* at 433-34 (quoting Cong. Globe, 39th Cong., 1st Sess. 1151).

Consistent with the broad remedial goal and pragmatic focus of the original statute, Congress sought to broaden the scope of § 1981 in 1991. In particular, Congress explicitly stated its findings in Public Law 102-166 that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace" and "legislation is necessary to provide additional protections against unlawful discrimination in employment." Pub. L. 102-166, § 2, 105 Stat. 1071. In a similar vein, the law states that among the purposes of the 1991 amendments were "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace" and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.*, § 3; *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 309 (1994).

These statements by the legislative branch manifest an unequivocal intent to buttress the remedies previously recognized under § 1981, and to protect broadly against the impairment of contractual relationships, including employment, on the basis of race.

2. As Justice Marshall observed long before the passage of the Civil Rights Act, "[s]tatutes . . . are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820); *see also N. Star Steel Co. v. Thomas*, 515 U.S. 29, 37 (1995) (Scalia, J., concurring in judgment) (considering, where Congress had not prescribed a limitations period to govern a cause of action, whether application of a state statute of limitations "would frustrate the purposes of the federal enactment"). Here, exclusion of retaliation claims from the broad compass of § 1981 would thwart the purpose of the statute.[6] Such a reading should therefore be avoided.

The promise of equal treatment in the context of contractual relationships would be nullified if employers could retaliate with impunity against employees who lodge grievances about race discrimination. Without an apparatus to redress and deter retaliation, not only would the core antidiscrimination imperative of § 1981 become a dead letter in the individual case, but at a more fundamental level, the very system would "unravel," as this Court noted in the analogous context of sex discrimination in violation of Title IX. *See Jackson*, 544 U.S. at 180 ("Reporting incidents of discrimination is integral to Title IX enforcement and would be

---

6. Disregard of Congress' purpose was no more sanctioned around the time of the enactment of the Civil Rights Act in 1866 than it is now. *See, e.g., Anthony v. Butler*, 38 U.S. 423, 426 (1839) (where the "statute [is] remedial in its character, and [is] intended by the legislature to remedy the mischief occasioned by the rule of law as expounded by the Courts," "[t]he construction of such a statute should be liberal, to prevent the mischief").

discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."). This unraveling effect would be particularly pronounced in the context of racial harassment at the workplace and racially hostile work environments, which are forms of discrimination that are often insidious and difficult to detect. Accordingly, it is particularly important for employees, who are uniquely well positioned to identify and report such discrimination, to feel free to report it to their employer. Individuals — particularly those who are not protected by other statutes such as Title VII — will likely be chilled into silence by a regime that tolerates retaliation. Indeed, a significant body of social science literature confirms that "the threat of retaliation functions as a powerful silencer" and the "understanding of retaliation that emerges from this literature demonstrates the need for strong legal protection from retaliation against persons who identify and challenge inequality." Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 24-25, 64 & n.75 (2005) (citing social science data); *see also* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801, 818 (2006) (noting "[e]xperimental research" substantiating fears expressed by those alleging discrimination that they will suffer retaliation).

Absent meaningful protection against reprisal, unlawful acts of discrimination will never come to light. And absent an effective deterrent mechanism in the form of liability for retaliation in the many cases where Title VII does not provide relief, employers and other parties to contracts who engage in unlawful

discrimination will have no incentive to change their ways. Quite the opposite, as the opinion below pointed out: "To hold that section 1981 allows unfettered retaliation . . . would create perverse incentives for the employer to fire complainants as quickly as possible to thereby limit (or entirely avoid) damages under section 1981." J.A. 144.

Reversal of the lower court's conclusion that § 1981 provides redress for retaliation would undermine the robust remedial scheme that § 1981 was designed to create. Without such protection, the statute would become in many cases little more than a precatory statement of a lofty ideal, but an ideal without real content. Such a reading of the statute — so fundamentally at odds with its purpose — cannot be correct.

II. SECTION 1981 SHOULD NOT BE CURTAILED BECAUSE OF OVERLAP WITH TITLE VII

Petitioner and its amici are mistaken in suggesting that the court of appeals' reading of the statute will cause plaintiffs to circumvent the strictures of Title VII — including, in particular, its statute of limitations and requirement to exhaust administrative remedies before filing suit in court — and that § 1981 should be curtailed to avoid that possibility. Pet. at 16; EEAC Amicus Br. at 16-17; Chamber of Commerce Amicus Br. at 21. First, as this Court has repeatedly recognized, Congress specifically intended to create partially overlapping schemes of liability under § 1981 and Title VII, and the coexistence of those complementary schemes is firmly embedded in our legal tradition. Second, the lower

court's reading of § 1981 does not create any conflict between § 1981 and Title VII in any event, because the two regimes are not coextensive. Third, because Title VII affords plaintiffs many advantages, there is no reason to believe — and no evidence to suggest — that plaintiffs will generally bypass Title VII in favor of § 1981.

A. Congress Intended to Create Partially Overlapping Schemes of Liability Under § 1981 and Title VII.

Petitioner and its amici urge the Court to construe § 1981 narrowly to foreclose claims for retaliation based on the policy argument that the lower court's contrary reading "dilutes Title VII" (Pet. Br. at 39), improperly allows plaintiffs to "bypass" Title VII's enforcement mechanism (EEAC Amicus Br. at 17) and "undermine[s]" Title VII's conciliation process (Chamber of Commerce Amicus Br. at 24). Unsurprisingly, these and similar arguments have been made numerous times before and, just as many times, they have been rejected by this Court.

Johnson provides a paradigmatic example of the Court's repeated recognition and approval of the partially overlapping schemes of liability that the legislative branch has deliberately created. There, the Court held that "the remedies available under Title VII and § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent," notwithstanding the benefits of the

conciliation procedure contemplated by Title VII. 421 U.S. at 461. As the Court explained:

> Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief.

Id. at 459 (citation omitted). Indeed, the *Johnson* Court noted evidence of Congress' intention that the remedial schemes under § 1981 and Title VII exist side by side and "augment each other" in such a way that they "are not mutually exclusive." *Id.* at 459 (quoting H.R. Rep. No. 92-238, at 19 (1971), 1972 U.S.C.C.A.N. 2137, 2154). The Court, moreover, pointed out that, in considering the Equal Employment Opportunity Act of 1972, the Senate had specifically rejected an amendment that would have deprived a claimant of any right to sue under § 1981 in lieu of an exclusive remedy under Title VII and the Equal Pay Act. *Id.* at 459 (citing 118 Cong. Rec. 3371-73 (1972)); *see also Runyon*, 427 U.S. at 175 n.11.

In *Patterson*, the Court again was asked to curtail the reach of § 1981 based on the argument that the statute "frustrates the objectives of Title VII" when applied to contracts of employment and "undermines Congress' detailed efforts in Title VII to resolve disputes . . . through conciliation rather than litigation as an initial matter." *Patterson*, 491 U.S. at 173-74. Rejecting these calls, the *Patterson* Court noted that "there is some necessary overlap between Title VII and § 1981, and . . .

where the statutes do in fact overlap we are not at liberty 'to infer any positive preference for one over the other.'" *Id.* at 181 (quoting *Johnson*, 421 U.S. at 461).[7]

These cases foreclose petitioner's argument that § 1981 must be read narrowly because, in effect, deference to Title VII's administrative scheme "trumps" the remedies provided by § 1981. Accordingly, even if the lower court's reading of § 1981 did undermine Title VII's regime (which, as shown below, it did not), petitioner's argument should be rejected for two reasons. First, *stare decisis* compels adherence to the longstanding precedent, firmly embedded in our legal culture, establishing that any overlap between the two schemes is neither problematic nor inadvertent. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citing "'wide acceptance in the legal culture'" as a reason to avoid overruling precedents) (quoting *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting)). Indeed, the Court in *Patterson* noted that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at

---

7. Although the Court went on to note its "reluctan[ce] . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute," *Patterson*, 491 U.S. at 181, that statement provides no support for a limiting construction of § 1981 here because, after *Patterson* — and long after the passage of Title VII in the Civil Rights Act of 1964 — Congress deliberately expanded the reach of § 1981 in the amendments to the statute in 1991. *See* pp. 5-6, 17, *supra*.

172-73. And, second, the question of whether or not the partial overlap reflects sound policy is ultimately an issue for Congress, not for the courts.

B. Reading § 1981 To Encompass Claims for Retaliation Does Not Undermine Title VII.

In any event, the conclusion that § 1981 covers claims for retaliation presents no conflict between the two remedial schemes because "[s]ection 1981 is not coextensive in its coverage with Title VII." *Johnson*, 421 U.S. at 460. Section 1981 reaches a variety of claims that Title VII does not reach (and which might go unremedied without a retaliation claim under § 1981), such as claims against businesses with fewer than fifteen employees. *See Rivers*, 511 U.S. at 304 n.3 ("Even in the employment context, § 1981's coverage is broader than Title VII's, for Title VII applies only to employers with 15 or more employees, *see* 42 U.S.C. § 2000e(b), whereas § 1981 has no such limitation."). Indeed, in 1990, a Senate report noted that § 1981 is "the only federal law banning race discrimination applicable to the 3.7 million firms with fewer than 15 employees." H.R. Rep. No. 101-315, at 12 (1990).

Moreover, while Title VII covers discrimination and retaliation only in the context of employment, 42 U.S.C. §§ 2000e-2(a) & 2000e-3(a), § 1981 covers discrimination and retaliation in the context of *all* contracts. 42 U.S.C § 1981(a), (b); *see also Rivers*, 511 U.S. at 304 (noting that because § 1981 "covers all contracts," a "substantial part" of its sweep "does not overlap Title VII").

Because Title VII is limited to discrimination in employment, it affords no protection from retaliation

against independent contractors, *see, e.g., Danco Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 13 (1st Cir. 1999), and a reading of § 1981 that forecloses claims for retaliation in this context would accordingly leave such persons without a federal remedy if they suffer reprisal as a result of complaining about race discrimination. In other areas, such as the First Amendment context, the Court has recognized the need to protect independent contractors — like employees — from retaliation. Even though the text of the First Amendment contains no mention of the word "retaliation," this Court has not only extended its protections to public employees who suffer retaliation for the exercise of their free speech rights, *see Perry v. Sindermann*, 408 U.S. 593, 597 (1972), but also to independent contractors who provide services or goods to the government and who likewise suffer such retaliation. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (failure to afford such protections to independent government contractors would leave their rights "unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services").

Amici's argument that Title VII should be an employee's exclusive remedy for retaliation because it affords the employer "prompt notice" of a potential claim (EEAC Amicus Br. at 18; Chamber of Commerce Amicus Br. at 24) amounts to a paradoxical proposition. When an employer fires an employee for notifying it of race discrimination, it can hardly maintain that it is entitled to prompt notice of a subsequent retaliation claim that is predicated on the very grievance that caused it to retaliate in the first place.

C. There is No Reason to Believe That Plaintiffs Will Bypass Title VII for § 1981.

Finally, the suggestion that upholding the lower court's conclusion will cause plaintiffs to bypass the strictures of Title VII, and that Title VII will be rendered a nullity as a result, is implausible and not empirically supported. While petitioner notes statistics showing a rise in retaliation claims *under Title VII* over the last decade, it points to no evidence suggesting a significant rise in the filing of § 1981 claims alleging retaliation for complaints about race discrimination in the wake of decisions by the courts of appeals, including the Seventh Circuit, concluding that such claims are cognizable under § 1981. *See* Pet. Br. at 39; *see also* Chamber of Commerce Amicus Br. at 23.

In fact, there is no reason to anticipate that this Court's confirmation of a right to seek redress for retaliation under § 1981 would render Title VII redundant, because there are important advantages to the employee of Title VII's administrative apparatus. For example, the employee many benefit from an investigation conducted by the Equal Employment Opportunity Commission, which — armed with broad investigative powers, including the power to issue subpoenas, *see* 42 U.S.C. § 2000e-9 — may unearth evidence the employee would never otherwise uncover. That is especially so if the employee is proceeding pro se, as was respondent at the outset of this litigation. The employee may also benefit from the Commission's decision to commence a civil proceeding itself against the employer, *see* 42 U.S.C. § 2000e-5(f)(1). Moreover, the employee may assert a Title VII claim on multiple

grounds in addition to race, including, "color, religion, sex, or national origin," 42 U.S.C. § 2000e-2. Given these benefits, in many situations, "the administrative route may be highly preferred over the litigatory [one]." *Johnson*, 421 U.S. at 461.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
PETER KARANJIA
Special Counsel to the Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
55 Elm Street
Hartford, Connecticut 06106

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street
Chicago, Illinois 60601

THOMAS MILLER
Attorney General
State of Iowa
Hoover Building, 2nd Floor
1305 East Walnut Street
Des Moines, Iowa 50319

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

MARTHA COAKLEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101

CATHERINE CORTEZ MASTO
Attorney General
State of Nevada
100 North Carson Street
Carson City, Nevada 89701

ANNE MILGRAM
Attorney General
State of New Jersey
Hughes Justice Complex
P.O. Box 080
Trenton, New Jersey 08625

MARC DANN
Attorney General
State of Ohio
30 EAST BROAD STREET
17th Floor
Columbus, Ohio 43215

HARDY MYERS
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, Oregon 97301

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia
Office of the Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05609

Attorneys for Amici Curiae